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SUPREME COURT, U.S.

United States Court of Appeals

For the Second Circuit

THE UNITED STATES OF AMERICA,

Appellee

—against—

JOSEPH GERNIE and EDWARD OGLIL,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF AND APPENDIX

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United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA

Appellee,

—against—

JOSEPH GERNIE AND EDWARD OGULL,

Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

Statement of the Case

Defendants-appellants herein appeal from a judgment of the United States District Court for the Southern District of New York rendered on February 19th, 1957, convicting them of violations of the Narcotics Laws of the United States (21 U. S. C. Secs. 173, 174) and of conspiracy (18 U. S. C. Sec. 371). The trial, which lasted six days, was held before the Hon. Edmund L. Palmieri, District Judge, and a jury. Appellant Gernie was sentenced to 10 years and a committed fine of $5,000 was imposed; appellant Ogull was sentenced to 5 years. Numerical references herein, unless otherwise indicated, relate to pages of the transcript of record. Those portions especially pertinent to the points hereinafter argued are set forth in the accompanying appendix.

The Indictment

The indictment, in each of the first six counts, charges that certain defendants unlawfully received, concealed, sold and facilitated the transportation, concealment and sale of certain quantities of heroin. Some of the counts included other defendants, to wit, Buzzeo and Mayer, who were not on trial. The seventh count charges conspiracy to violate the narcotic laws.

Evidence and Proceedings on the Trial

The evidence and proceedings, to the extent that they are pertinent to the several errors assigned, will be discussed in connection therewith.

Grounds of Appeal

1. The case presents no evidence whatsoever that appellant Joseph Gernie received, concealed, sold or facilitated the transportation, concealment or sale of any narcotic drugs, or that he conspired to do any of the foregoing. The trial Court erred in denying his motions to dismiss and in permitting the jury to pass upon his guilt on the basis of mere suspicion.

2. The curtailment of cross-examination regarding one Berner, a paid government informer in this and other cases, coupled with the failure to produce him or to account for his absence, contravened the recent holding in *Roviaro* v. *United States*, 353 U. S. —, 1 L. Ed. 2d 639.

3. The government improperly placed on the stand a witness who it had reason to believe would, as he did, plead the Fifth Amendment, to appellants' prejudice.

4. The trial Court erred in denying defense motion to dismiss based on the ground that entrapment was established.

5. The trial Court erroneously denied a motion for a mistrial after receiving incompetent and unresponsive testimony of the witness Wurms that appellant Ogull planned to engage in the operation of a gambling house.

6. The trial Court erroneously denied a motion to strike improper testimony that appellant Gernie had in his possession a certain marked bill more than two months after it had been paid over by a government agent to Buzzeo.

7. In charging on the credibility of witnesses, the trial Court omitted from the rule of *falsus in uno* the necessary qualification that the testimony had to relate to material facts.

Statutes Involved

TITLE 18, UNITED STATES CODE

§371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, ch. 645, §1, 62 Stat. 701.)

§173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.*

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. (Feb. 9, 1909, ch. 100, §2, 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26,

1922, ch. 202, §1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; June 14, 1930, ch. 488, §3, 46 Stat. 586.)

TITLE 21, UNITED STATES CODE (1952), (PRIOR TO AMENDMENT OF JULY 18, 1956, 70 STAT. 570)

§174. *Same; penalty; evidence.*

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173 and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556) as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States

Attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States Attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this section.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Feb. 9, 1909, ch. 100, §2(c), 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922 ch. 202, §1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; Nov. 2, 1951, ch. §666, §§1, 5(1), 65 Stat. 767).

TITLE 21, UNITED STATES CODE (SUPP. IV, 1957) (AS AMENDED JULY 18, 1956, 70 STAT. 570)

§174. *Same; penalty; evidence.*

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more

than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc. see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, title I, §105, 70 Stat. 570).

ARGUMENT

POINT 1

The case presents no evidence whatsoever that appellant Joseph Gernie received, concealed, sold or facilitated the transportation, concealment or sale of any narcotic drugs, or that he conspired to do any of the foregoing. The trial Court erred in denying his motions to dismiss and in permitting the jury to pass upon his guilt on the basis of mere suspicion.

The determination of the correctness of our position on this point necessitates a scrutiny of the record. We proceed to examine the references of the various witnesses to appellant Gernie.

The Government's first witness was Ivan Wurms, an agent of the Federal Bureau of Narcotics. He testified at considerable length regarding his meetings with appellant Ogull, Max Berner, Philip Buzzeo and Michael Mayer, beginning April 13, 1956 (R. 26-62), including various trans-

actions involving the purchase and sale of narcotic drugs. His first mention of appellant Gernie was with reference to an occasion on June 4, 1956, when he met Buzzeo and had a conversation with him at the Ship Ahoy Bar regarding the prices of drugs (R. 58-59). They left the bar and entered an automobile, in which they drove to the Beacon Garage, at 210 West 76th Street (R. 59-60). There they parked, and he testified that he gave Buzzeo a sum of money. A little later he saw another car drive up in front of the Devonshire Garage across the street, and Michael Mayer alighted (R. 61-62). A short time later he testified that he observed appellant Gernie and Buzzeo together (R. 62). According to the witness, Buzzeo entered the Devonshire Garage, walked across the street, entered the vehicle in which the witness was waiting and told him that he had the drugs. They drove off and in the course of the trip Buzzeo handed him the drugs (R. 62-63). Certainly nothing was said so far which would indicate the slightest criminality on the part of appellant Gernie.

The next mention in the testimony of this witness with regard to Gernie relates to July 12, 1956 (R. 75). The witness said that he met Buzzeo at the Dolphin Cafe at about 9 in the evening, from which point they drove away at 10:30 and headed north to the Devonshire Garage (R. 76-77). He said that he delivered a sum of money to Buzzeo and they parked the car east of the Devonhsire Garage at 10:45 (R. 77-79). Then, the witness said Buzzeo met a man named Mosca; the two walked north on Broadway and disappeared from his view (R. 79). At about 10:55 an Oldsmobile drove up to the entrance of the Devonshire Garage, and it was driven by Gernie (R. 79). Gernie parked the car in the garage, emerged and walked west on 76th Street. He met Buzzeo, the two shook hands and they entered the side door of the Lighthouse Cafe (R. 80). At about 11 the two came out, Gernie walking about four feet behind Buzzeo (R. 80-81). Buzzeo entered the car entrance

of the garage and Gernie walked into the garage office. A little later Gernie came out through the office and entered the car, after which Buzzeo took a bag which he had on his person and handed it to the witness (R. 81-83); it was later found to contain narcotic drugs. This second casual observation of Gernie certainly does not suffice to show any criminal conduct on Gernie's part.

The foregoing constitutes a fair statement of everything that the key witness Wurms had to say concerning Gernie, and it is obvious that nothing contained in his testimony suffices to constitute Gernie's actions as being criminal in the slightest degree.

The Government's second witness was another narcotics agent, one Anthony Zirilli. He testified that he saw Gernie for the first time on August 6, 1956, at 10 P.M., at the intersection of Columbus Avenue and 67th Street (R. 151). According to the witness, Gernie drove up in an automobile, parked it and walked east to another automobile, a green Pontiac, parked near the 67th Street Garage, which the witness had previously seen driven by Mayer (R. 152). The witness testified that Gernie opened the door of the Pontiac and placed a dark package inside of it, shut the door and continued walking into the office of the 67th Street garage (R. 152). The witness then saw Gernie meet Mayer, after which Mayer left the garage, entered the Pontiac and departed (R. 152-153). There was no evidence whatsoever in the case as to the nature or contents of the alleged package. A few minutes later, the witness testified, he saw a man whom he later identified as one Edwards, meet Gernie, and saw both of them meet one Harell. Then Harell and Gernie met in the office of the garage; two or three minutes later Harell came out and drove off with Edwards. Harell and Edwards were followed by agents and were arrested along with one Mobie, whom they had met (R. 154) and found to be in the possession of heroin. With respect to Zirilli's testimony, it is submitted that it did not establish any criminal act on the part of Gernie.

A third narcotics agent, Martin Pera, testified that on June 4, 1956, he saw Buzzeo and Wurms at the Ship Ahoy Bar, from which they drove to the Lighthouse Cafe (R. 161-162). Buzzeo sat at the bar and ordered a drink; then made a telephone call at the public booth, after which he resumed his place at the bar; five minutes later appellant Gernie entered and joined Buzzeo at the bar, conversing with him for several minutes. All that the witness could hear was the bartender's "Hello, Joe," and Gernie's acknowledgment of the greeting (R. 161-163). The two had "another drink or so," following which Gernie made a telephone call. Thereafter Gernie and Buzzeo went downstairs, where the washrooms were located, reappearing in five minutes (R. 163-164). They proceeded to the bar. Then Gernie, according to the witness, walked to the window and looked out for a few minutes; they had another conversation, after which Gernie left the premises (R. 164). The witness followed Gernie, whom he saw enter the office of the Devonshire Garage, emerging thence in the company of his nephew (by marriage), Michael Mayer. The latter drove off, while Gernie returned to the Lighthouse Cafe. Thereafter Gernie and Buzzeo came out and both went into the Devonshire Garage office (R. 165-166). In a little while Buzzeo returned to the automobile where Wurms was waiting, and they drove off as Gernie stood there "watching" (R. 165-166). Gernie returned to the Lighthouse Cafe (R. 166). So much for June 4, 1956.

On July 12, 1956, Pera further testified, at 10:20 P.M., he saw Buzzeo and Wurms come out of the Dolphin Cafe and drive to the vicinity of the Devonshire Garage (R. 166-167). Buzzeo got out of the car and walked towards the Lighthouse. He was greeted by a man whom Pera "had seen often in the company of Gernie prior to that time." The two entered the cafe. At about 10:50 Gernie drove up in the car which the witness had previously seen driven by Mayer. Gernie parked in the garage entrance (R. 167-168).

As Gernie approached the cafe he was met by Buzzeo and had a brief conversation with him. They went in together and soon emerged. Buzzeo opened the door of the car at the driver's seat and partially entered for a moment. He and Gernie then went into the garage office, coming out immediately, after which Buzzeo rejoined Wurms and drove off with him (R. 168-169).

On September 18, 1956, Pera and two other agents arrested Gernie in the Lighthouse Cafe (R. 169). The witness searched him and found on his person various inconsequential papers and a wallet containing, according to Pera, $412 (R. 170). He said further (R. 171):

> "One of the $100 bills we found on Joseph Gernie at the time we arrested him bore the same serial number and was the same bill used to purchase evidence on July 12, 1956, from Buzzeo."

A motion to strike this evidence, it may be noted, was denied (R. 542-3, 586). The witness questioned Gernie concerning the ownership of the Oldsmobile car parked opposite the Devonshire Garage, and it developed that it was not registered in his name (R. 174-176), but in the name of Rose Quinn, his sister-in-law (R. 181-182). Later the witness searched Gernie's home and found $1500 in a lady's handbag, Mrs. Gernie claiming it as her own (R. 187-188); no part of that sum had the serial numbers of the marked money outstanding (R. 188). The witness admitted that on the occasions when he observed Gernie or Buzzeo in the garage office he was able to see what was happening there (R. 200).

It is submitted that all of Pera's testimony regarding appellant Gernie does not rise above the level of meetings and conversations with Buzzeo. These are matters not merely entirely consistent with innocence but utterly devoid of a single fact or circumstance pointing to the com-

mission of a crime. If riding in an automobile, telephoning, chatting, drinking, walking into a garage office, greeting a bartender or anything else can be fashioned or distorted into a picture suggestive of guilt, then every friend or acquaintance of Buzzeo's with whom he had the most casual contact during the six-month period involved should have been arrested and prosecuted as a coconspirator.

Patrick P. O'Carroll, a fourth narcotics agent, testified that he saw Gernie at various times in June, July and August (R. 202-204). On August 2, 1956, in the vicinity of the West End Garage, between Columbus Avenue and Central Park East, he saw a Plymouth car drive up and park. The occupants were Gernie and two men whom the witness later learned to be Jackson and Harell. The latter walked into the garage and returned to the car in about three minutes. Immediately thereafter Mayer came out to his own car, and both cars drove off (R. 204-205). The witness and agent O'Connor followed Mayer's car to 307 West 69th Street, where Mayer went into that building for ten minutes. The witness testified that he saw the first car parked down the street. When Mayer came out, Mosca and Gernie were with him (R. 205-206); they talked on the street a minute or two; Mayer returned to his car and drove away; Mosca walked north to West End Avenue; and Gernie went back into the building (R. 206-207). It is needless to remark that O'Carroll's testimony contained nothing to implicate Gernie.

The Government's fifth witness, George J. O'Connor, was also a narcotics agent (R. 209). So far as Gernie was concerned, he "corroborated" the testimony of Pera that on June 4, 1956, Gernie was looking out of the window as Mayer drove by the Lighthouse (R. 209-210); and O'Carroll's testimony as to Gernie's going to the premises at 307 West 69th Street on August 2, 1956, (R. 212-216). This witness added nothing which could fairly be viewed as implicating Gernie in any degree.

Two chemists testified for the Government regarding their respective analyses (R. 257, 276) of various drugs in no way traced to or connected with Gernie.

Benjamin Harell, a defendant who had pleaded guilty (R. 295), was called as a witness but when asked where he obtained the heroin found upon him when he was arrested, he invoked the Fifth Amendment (R. 297), in which he was sustained by the Court (R. 309-312).

Donald E. Miller, an agent and attorney in the Bureau of Narcotics, testified that he saw Buzzeo talking to Gernie in the Lighthouse on June 4, 1956 (R. 312-313); saw Gernie look out of the window, leave the restaurant, enter the garage and return to the restaurant (R. 314). He saw Buzzeo and Gernie emerge from the restaurant, the former driving off with Wurms and Gernie walking back into the restaurant (R. 314-315). On July 12, 1956, he saw Buzzeo and Gernie walk into the Lighthouse and thence into the garage (R. 318). All of the foregoing was obviously cumulative, as was the testimony of the same witness about the events of August 6, 1956 (R. 321-323).

The foregoing constitutes a digest of the Government's case in chief against appellant Gernie, who duly moved for a directed judgment of acquittal (R. 328). The argument was made in his behalf that no evidence had been adduced indicating sale, receipt, possession or facilitation; that there was no proof of even constructive possession by him; that the Government had shown no participation by him in any conspiracy, no act in furtherance thereof, nor even anything tending to establish his awareness of the existence of a conspiracy; and that the circumstantial evidence, if any, barely rose to the level of a suspicion (R. 328-332). The motion was denied, the Court declaring the evidence sufficient to find both appellants guilty of the substantive and conspiracy charges (R. 335). A like motion was denied on the entire case (R. 543).

Appellant Ogull testified at great length (R. 356-459) concerning his dealings with Berner, Buzzeo and Wurms, but his testimony includes no mention of appellant Gernie.

Michael Mayer, a defendant who had pleaded guilty (R. 461-462), and, as has been indicated, a nephew of Gernie by marriage, testified that, so far as the witness knew, Gernie had no connection with or knowledge of any narcotic transactions (R. 464-465). On cross-examination he denied that upon his arrest he had implicated Gernie (R. 487-488, 498-501). To impeach this witness, the Government recalled Pera, who testified that after Mayer's arrest he made a statement involving Gernie (R. 516-520). There is no question that the prosecution capitalized upon this golden opportunity to supply, so far as the jury was affected, the shortcomings in its proof. After some vacillation on the subject (R. 518, 538-539), the Court finally charged the jury that Pera's testimony on this point could be considered only for the purpose of discrediting Mayer and not "as proof of the guilt or innocence" of either appellant (R. 545-546) or "as affirmative evidence against the defendants" (R. 589). It is a fair assumption that this subtlety eluded the jury.

Despite the elaborate and extended surveillance which the record manifestly discloses, the Government's agents adduced nothing which by the most strained construction tends to establish appellant Gernie's guilt or warranted the submission of the issue to the jury. Even if there were suspicious circumstances—although we fail to perceive any—they would not replace the salutary requirement of actual proof. As this Court ruled in *United States* v. *Buchalter*, 88 F. 2d 624 (by Chase, *Circ. J.*):

> "Difficulty of proof is no substitute for actuality of proof and an accused is presumed to be innocent and entitled to be acquitted until proved guilty as charged beyond a reasonable doubt. Here there were, indeed, many suspicious circumstances to lead to

> the conclusion that Buchalter was guilty, but there was no substantial evidence to overcome the presumption of innocence, and so it was error to deny his motion."

Similarly, in *Karchmer* v. *United States*, 61 F. 2d 623, the Seventh Circuit held (by Evans, *Circ. J.*):

> "We are not unmindful of the rule which makes the jury the sole judge of facts over which there is a conflict. We are not intending to usurp any of the jury's prerogatives. Had the record presented a case where conflicting inferences arose, or where the full significance of facts necessitated measurement and weighing by a jury, we would not disturb the verdict. But the verdict, as we view it, rests upon speculation and conjecture. Such being the fact, the case should not have been submitted to a jury: A verdict which finds its only support in conjecture and speculation cannot stand."

In the recent case of *Vick* v. *United States*, 216 F. 2d 228, Rives, *Circ. J.*, wrote for the Fifth Circuit:

> "Appellant may be guilty, but his conviction cannot rest upon mere conjecture and suspicion. The evidence does not prove him guilty beyond a reasonable doubt and is not sufficient to warrant the jury in so concluding. The judgment is, therefore, reversed, with directions to grant the appellant's motion for judgment of acquittal."

To like effect is the recent Tenth Circuit decision in *Thomas* v. *United States*, 239 F. 2d 7, where the evidence against appellant was held to create no more than a suspicion of guilt of a violation of 21 U. S. Code Sec. 174.

The inconsequential circumstance of appellant Gernie's association with a violator of the law is indicated by deci-

sions such as that of the Eighth Circuit in *O'Brien* v. *United States*, 299 F. 568, where Symes, *D. J.*, wrote:

> "The presumption of innocence in his favor is not overcome, in the absence of other proof connecting him with the crime, by the fact that he was often seen with one who committed the offense, or knew it was to be committed, or was a spectator thereof."

The last few elements stressed in the foregoing quotation, inadequate as they were held to be, are quite lacking in the case at bar.

Whether the acts and conduct of appellant Gernie, as described by the several witnesses, be regarded separately or in the aggregate, they do not have the logical or probative quality essential to sustain a verdict of guilt. If the Government's evidence "is consistent with a reasonable and rational hypothesis of innocence, there can be no conviction." (McDermott, *Circ. J.*, writing for the Tenth Circuit, in *Eierman* v. *United States*, 46 F. 2d 46.) There is no need again to detail the succession of innocuous observation which the Government arranged into an alleged prima facie case. The more closely they are scrutinized, the more inevitably they compel the conclusion of insufficiency. If so shabby a substitute for proof may be invoked to justify a criminal conviction, then no man's liberty is safe.

POINT 2

The curtailment of cross-examination regarding one Berner, a paid Government informer in this and other cases, coupled with the failure to produce him or to account for his absence, contravened the recent holding in *Roviaro* v. *United States*, 353 U. S. —, 1 L. Ed. 2d 639.

The Supreme Court of the United States has recently had occasion to denounce the practice of reliance upon the faceless informer. Although, as the majority opinion by Mr. Justice Burton declared (footnote 8), "the record contains several intimations that the identity of John Doe was known to petitioner and that John Doe died prior to the trial," the trial Court's ruling that the prosecution might supposedly and officially withhold disclosure of his identity was held to be reversible error. John Doe was an undercover Government employee, who had taken a material part in bringing about the defendant's possession of the heroin which was the basis of the prosecution. *Roviaro* v. *United States*, 353 U. S. —, 1 L. Ed. 2d 639. Naturally in that case the Government neither produced nor made the witness available, although other Government agents testified at length concerning John Doe's alleged meetings and transactions with the defendant. The Court discussed the nature of the privilege of law-enforcement officials to withhold the identity of persons who furnish information of violations. Certain observations on the subject are most pertinent herein, for the Court said:

> "The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has

been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

"A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the the privilege must give way. In these situations the trial Court may require disclosure and, if the Government withholds the information, dismiss the action."

The opinion contains, in addition, the following significant language on the subject of a defense of entrapment:

"Petitioner's opportunity to cross-examine Police Officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment . . .

Finally, the Government's use against petitioner of his conversation with John Doe while riding in Doe's car particularly emphasizes the unfairness of the nondisclosure in this case. The only person, other than petitioner himself, who could controvert, explain or amplify Bryson's report of this important conversation was John Doe. Contradiction or amplification might have borne upon petitioner's knowledge of the contents of the packages or might have tended to show an entrapment."

If the unavailability of the witness was held to outweigh the privilege of cross-examining a Government witness who did testify, what then are we to say of a situation (as herein) where a full cross-examination was denied?

At the outset of the trial of the instant case, counsel for appellant Ogull stated to the Court that he believed Maxwell Berner, a special employee of the Narcotics Bureau, might be a witness in the case; he had known Berner for many years, had searched and was unable to find him; Berner had been employed by the Government in many cases involving narcotics; his testimony might have a bearing upon an issue of entrapment; counsel therefore wanted the Government to produce Berner (R. 7-9). The Assistant United States Attorney, asked by the Court whether Berner was available, answered, "To the best of my knowledge he is not available. We can't produce him." He stated further that he did not intend to use him (R. 9). Thereupon defense counsel declared (R. 9-10):

> "In view of the fact that I am told that Mr Berner is not to be used by the Government, I now feel that it is a very unfair method of prosecuting in this case because Berner, the evidence will show, was a Government agent or employee in this case, who participated in all of the conversations and, as such, he should be produced here by the Government and not force the defense to attempt to produce him, since he is their paid agent, to make out a case here as against any one or as against these defendants."

Counsel was quite correct in his anticipation that Berner would be a key figure in the prosecution. Narcotics Agent Wurms, the Government's principal witness, began by testifying that Berner introduced him to Ogull and to Buzzeo (R. 27-29). This was the inception of all of the alleged narcotics transactions. The witness had been introduced to Berner by Group Leader Amato of the Narcotics Bureau

(R. 90). Berner worked on various narcotics cases, being employed by the Bureau from November, 1955, until September, 1956, during which time he was paid approximately $2,800 by the Bureau (R. 95-96). Yet scarcely four months after the termination of his employment, when this case came to trial, the Government was taking the position that he was not available and could not be produced—this declaration not being sworn testimony but merely a statement on the record.

In the course of appellant's (Ogull's) motion to dismiss, considerable stress was placed upon the circumstance that Berner, who initiated everything in the way of introductions and inducing the sale of narcotics, was not available or subject to examination (R. 332-335).

In a case presented in the foregoing fashion, the least that could be said regarding both appellants' position is that they were certainly entitled to the fullest cross-examination of the Government's witnesses regarding Berner and his machinations, the part he played and what sort of individual he was. Nevertheless, we find the Court below repeatedly sustaining the Government's objections to questions directed to that end.

Thus, when Agent Wurms said that Berner was in the hat frame business, he was asked (R. 92):

> "Did you learn from Max Berner how he came to go into that business? Just tell us yes or no."

An objection to this question was sustained, and the defense was prevented from showing that the alleged legitimate occupation may have been a blind to cover his work as an informer.

Secondly, when Wurms was asked (R. 93):

> "Do you know how many convictions if any Max Berner had?"

the Court sustained an objection, saying Berner's credibility was not an issue. It should be obvious that defendants were entitled to have the jury apprised that Berner was a multiple ex-convict, whose background might well affect any scruples touching his operations. Also, information of this character, so readily obtainable by prosecuting officials, is generally a closed book to a defendant.

Thirdly, regarding Berner's first employment by the Bureau of Narcotics in November, 1955, Wurms was asked (R. 95):

> "Do you know if he had just come out of jail at that time?"

This, too, was excluded, and pertinent information withheld from the jury accordingly.

Fourthly, after Wurms testified that he did not know Berner's residence address at the time of the trial and that he had met him from time to time near the Narcotics Bureau office, he was asked (R. 101-102):

> "How did you arrange to contact him?"

An objection was sustained, despite the express assertion of counsel (R. 103):

> "I think I indicated to your Honor this morning before the trial commenced, and when I moved to have Berner brought here, because I feel that the Government knows where Berner is. I feel from the investigation that I have conducted that Maxwell Berner was hired by the Government as a special employee and my client, the defendant Ogull, was then trapped into getting into the picture through Maxwell Berner.
>
> "My purpose is to show that they had discussed other business and so did this witness who is on

> the stand, before Berner led my man to do certain things which are charged here. I feel it is entrapment and I want to bring it out by this witness."

Despite the explanation the trial Court reiterated that the objection was sustained, and due exception was noted (R. 105). It is submitted that this was an inquiry of the utmost importance. In a trial which was destined to continue for another week, the defense was foreclosed from ascertaining the means whereby the Government's representatives kept in touch with the informer, and inferentially from obtaining information which might well have permitted Berner to be located. Wurms apparently had no difficulty in getting in touch with Berner whenever it was expedient. Appellants surely had the right to procure compulsory process to have the benefit of his attendance at the trial. But the trial Court by its ruling obstructed the effort. "The law is not a game" (Ehrlich, "Die Juristische Logik"), and neither the prosecution nor any of its agents should be permitted to take a position calculated to or having the necessary effect of withholding competent and material testimony. Certainly a cat-and-mouse policy in the matter of the whereabouts of an important potential witness calls for no imprimatur of approval. Particularly when human liberty is at stake, a flagrant course of concealing or suppressing a source of evidence, however subtly engineered, may not properly be viewed as other than reprehensible. It would appear that the learned Court below failed to appreciate the significance of the inquiry.

At this point in the proceedings the Assistant United States Attorney said in what appears to be carefully chosen language (R. 103-104):

> "May the record show that there is nothing to indicate that the Government has any knowledge of Berner's present whereabouts."

Not that the Government was ignorant thereof, but merely that such ignorance had not yet been established by sworn testimony or as matter of record; not that the Bureau of Narcotics was out of touch with Berner, but only the prosecutor; not that the Government's agents had not conferred with Berner that very morning, but simply that in the afternoon he had proceeded to some unknown destination. Quite consistently with the foregoing declaration, Berner may well have been in conference with the Narcotics Bureau an hour before. This was said at a time when a more forthright assurance was manifestly in order. As for defense counsel's indication that he desired Berner's presence in Court, the Assistant United States Attorney said (R. 104):

> ". . . This is the first time I hear that he requires Berner's presence here."

That assertion was not quite accurate, for counsel had earlier stated (R. 8-10):

> "I therefore ask your Honor to ask the Government to have Mr. Berner here for me so that I might speak with him, because if the Government does not call him as a witness, and I feel the Government should, I might have to . . .
>
> "I am asking your Honor to ask the Government to produce him so I might speak with him . . .
>
> ". . . He should be produced here by the Government . . ."

The cumulative effect of the foregoing rulings was such as to hamper the defense in its efforts to elicit information having a material bearing upon the issues of the trial, more particularly the defense of entrapment, and consequently upon the determination of the case.

Attention is directed to the holding in *United States v. Reynolds*, 345 U. S. 1, 97 L. Ed. 727, where Mr. Chief Justice Vinson wrote:

> "The Government can invoke its evidentiary privileges only at the price of letting the defendants go free. The rationale of the criminal cases is that, since the Government which prosecutes a case also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its privileges to deprive the accused of anything which might be material to his defense."

The disclosure of how the Government's representatives managed to keep in contact with Berner may well have involved the revelation of secret or confidential information. But this consideration cannot outweigh the needs of a defendant charged with crime, or his right to be apprised how he may locate a material witness. Nor may this be viewed as being discretionary with the trial Court, for in the recent holding in *Jencks* v. *United States*, 353 U. S. —, 1 L. Ed. 2d 1103, Mr. Justice Brennan wrote:

> "The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession."

It is submitted that the application of the foregoing principles to the errors indicated calls for a reversal of the judgment of conviction.

POINT 3

The Government improperly placed on the stand a witness who it had reason to believe would, as he did, plead the Fifth Amendment, to appellant's prejudice.

The Government called as a witness one Benjamin Harell, an offender who had pleaded guilty and had received a five-year sentence (R. 295-296). He was asked by the Assistant United States Attorney where he had obtained the heroin that was taken from him when he was arrested in August, 1956, and he invoked the Fifth Amendment (R. 297). A lengthy colloquy followed, at the conclusion of which the Court sustained the witness's claim of immunity (R. 296-312). The prosecutor subsequently admitted that one Muldow, who had been counsel for Harell, had indicated the likelihood of such a course, thus (R. 541-542):

> "Harell stated to me that what now disturbed him was he was afraid he would be injured. Harell stated to me what bothered him was he had to go out and live on the street afterwards. I then discussed this with Mr. Muldow of the Legal Aid Society, who represented him. He informed me that he is so terrified he insisted on pleading guilty to the full indictment, even though at that time the Government was not pressing the indictment under Sections 173 and 174 which called for a five year minimum mandatory sentence upon conviction.
>
> "Mr. Muldow said to me, because Harell was so terrified, Mr. Muldow felt—not because Harell was terrified but Mr. Muldow broached the argument that, whether he could possibly plead the Fifth Amendment. Mr. Muldow thought he could and I thought he could not. There the matter rested. That is the extent of my intimation there would be a plea."

The Court ultimately charged the jury not to consider Harell's claim of privilege as evidence against the defendants (R. 586-587).

Counsel for appellant Gernie urged that the Government had received indications (as shown by the foregoing quoted passage) that Harell would be a reluctant witness; and that in view of the other testimony as to Harell's meetings with Gernie, Harell's being placed on the stand and his prompt plea of the Fifth Amendment had created an aura of prejudice against Gernie, the curing of which by instruction to the jury was doubtful (R. 535-537).

We believe it to be the sound rule that matters relating to the validity or tenability of the assertion of privilege by a witness should be investigated by the trial Court out of the presence of the jury. See *Wilmering* v. *United States*, 4 F. 2d 209, cert. den. 267 U. S. 605, 69 L. Ed. 810. The circumstances herein at the very least placed the Government on notice that it might be confronted by such a claim by Harell, and a fair regard for appellants' rights required preliminary ascertainment by the Court apart from the jury.

The manner in which the unusual incident arose could not but be injurious to appellants. To begin with, a claim of privilege by a witness is sufficiently rare in the course of a criminal trial to make a solid impact upon the minds of the jurors. The natural, indeed casual, reaction of any juror might be along the following lines: This fellow Harell admitted he was guilty; the Government called him as a witness to implicate the defendants; he invoked the Fifth Amendment not so much to protect himself as to shield the others; and the reason he did that was either by agreement with the defendants or because he was afraid that they might retaliate against him in some way; in any event, that settles it and removes any doubt as to their guilt. However salutary the Fifth Amendment may be as a bulwark against oppression and as a constitutional shield

for the innocent and guilty alike, it certainly may not be employed as an instrumentality to engender ugly suspicions against defendants on trial for their liberty. Retrospectively it may be concluded that the trial would have been fairer without this spectacular incident, but this is not enough. Once the Government was aware or had good reason to believe that Harell was inclined to such a course, the question should have been made the subject of preliminary exploration. The course actually pursued was another of the various occurrences cooperating to make the trial an unfair one.

POINT 4

The trial Court erred in denying defense motion to dismiss based on the ground that entrapment was established.

From the very outset (R. 26-31) it is clear from the testimony of the Government's chief witness, Agent Wurms, that he, acting in conjunction with the special employee, Maxwell Berner, induced codefendant Buzzeo to sell narcotics and that appellant Ogull was used as an intermediary for that purpose. It would be pointless to quote virtually the entire record to show that there was no evidence to negative this conclusion. Naturally, if Ogull was entrapped, there would be nothing else in the case to involve appellant Gernie—although, as argued elsewhere, even the entrapment transactions do not in the slightest degree establish his guilt. Ogull's own testimony likewise showed the entrapment, although we do not rely thereon for this point. A motion was made on his behalf as follows (R. 543):

> "In view of the testimony that the Government's special employee improperly induced the defendant Ogull to commit the crimes charged in the indict-

ment I respectfully ask your Honor to dismiss the indictment."

This motion was denied.

The leading case on the subject of entrapment is *Sorrells* v. *United States*, 287 U. S. 435, 77 L. Ed. 413, where Mr. Chief Justice Hughes wrote:

> "The Federal Courts have generally approved the statement of Circuit Judge Sanborn in the leading case of Butts v. United States (C. C. A. 8), 18 A. L. R. 143, 273 Fed. 38, supra, as follows: 'The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.' The judgment in that case was reversed because of the 'fatal error' of the trial court in refusing to instruct the jury to that effect."

The separate concurring opinion in the same case by Mr. Justice Roberts, with Mr. Justice Brandeis and Mr. Justice Stone agreeing, stated:

> "Public policy forbids such sacrifice of decency. The enforcement of this policy calls upon the court, in every instance where alleged entrapment of a defendant is brought to its notice, to ascertain the facts, to appraise their effect upon the administra-

> tion of justice, and to make such order with respect to the further prosecution of the cause as the circumstances require."

It is also noteworthy that the Court in the same case cited with approval *United States* v. *Lynch* (D. C. N. Y., 1918), 256 F. 893, wherein the facts are noteworthy. There Hough, *D.J.*, wrote:

> "A man who expected to be an officer in the United States Army, and had a very good reason to believe that he would, was asked what he would want out of a government contract over which he seemed—only seemed—to have some control. He replied most properly, most honorably, 'nothing', because he was about to become an officer; and there the matter dropped on that occasion."

Later, at the instigation or by the order—and the Court said it made no difference which—of government officers comprising the Department of Military Intelligence, the offeree told defendant that he had reconsidered the question and in effect asked for the money. The Court held that this constituted "provoking and creating a crime", saying further:

> "Border line cases are difficult, and doubtless it is usually best to leave the matter to the jury when and if, in view of the evidence, a reasonable man would be justified in holding that the accused had the intent or desire to do that for which he was indicted, and seized and swallowed the bait that was laid for him."

On the foregoing facts the Court held that the prosecution was "an endeavor to punish a crime which would never have been committed if it had not been for the request of the government officer", and thereupon peremptorily advised the jury to acquit the defendant.

The Court is referred to the similar holdings in decisions in *Woo Wai* v. *United States* (C. C. A. 9, 1915), 223

F. 412; *Sam Yick* v. *United States* (C. C. A. 9, 1917), 240 F. 60; *Gargano* v. *United States* (C. C. A. 5, 1928), 24 F. 2d 625; *Ybor* v. *United States* (C. C. A. 5, 1929), 31 F. 2d 42; *Newman* v. *United States* (C. C. A. 4, 1924), 299 F. 131, and *Capuano* v. *United States* (C. C. A. 1, 1925), 9 F. 2d 41.

POINT 5

The trial Court erroneously denied a motion for a mistrial after receiving incompetent and unresponsive testimony of the witness Wurms that appellant Ogull planned to engage in the operation of a gambling house.

When the witness Wurms was called in rebuttal—appellant Ogull having told of a conversation regarding his plan to acquire some property near Lake Ronkonkoma for a barbecue stand, bar and restaurant (R. 360)—Wurms testified that on August 10th, 1956, he received a telephone call from Ogull and met him at the West Side Airlines Terminal Restaurant, 46th Street and Eighth Avenue (R. 511). Buzzeo arrived and the three of them had a conversation regarding a trip Wurms said he planned to take to Cuba (R. 512). Then came the following question (R. 513):

> "Was it on that occasion that you discussed real estate?"

Instead of giving a yes or no answer, Wurms said:

> "Phil Buzzeo mentioned a piece of property that a friend of his had in California that he had just returned from California and this person wanted to sell it. It was a restaurant and, I believe, in the back they could carry on some gambling games."

Counsel for Ogull moved for a mistrial, his motion was denied and exception taken (R. 513-514).

The clear effect of this testimony was to convey to the jury the impression that Ogull was contemplating or considering opening a gambling house in California. Such an operation would be a crime under the laws of California (see California Penal Code, Sec. 330). Any such imputation—not coming within any of the recognized exceptions to show motive, intent or a common scheme—constituted a grave violation of the rights of appellant Ogull. We believe there is no proposition more firmly established than the one forbidding the proof or suggestion of other crimes in the course of a criminal prosecution. The citation of fundamental authority on the point is indeed superfluous, and we therefore content ourselves with reference to several recent illustrative cases.

In *Fallen* v. *United States*, 220 F. 2d 946, cert. den. 350 U. S. 924, 100 L. Ed. 808, proof even of like offenses, where not needed to establish criminal motive or intent, was held by the Fifth Circuit to be reversible error.

In *Helton* v. *United States*, 221 F. 338, a prosecution for illegal acquisition of marijuana, the same Court held it to be reversible error to introduce proof of defendant's admission to a federal agent that he had been smoking marijuana—despite the trial Court's direction that the evidence be stricken from the record.

In *Kraft* v. *United States*, 238 F. 2d 794, the Eighth Circuit held it to be reversible error to admit proof of another offense even though of the same character as the one charged in the indictment, discussing at some length the unfairness of introducing such collateral issues.

In *United States* v. *Meagley*, 239 F. 2d 637, a Seventh Circuit case, the defendant was prosecuted for stealing medical supplies from the Government. A Government witness testified that he had obtained from the defendant a written statement regarding an entirely different incident. When asked whether the incident was connected with

the subject-matter of the trial, the witness said, "The signed statement involved the forgery of a prescription." No motion was made that the answer be stricken and the trial judge took no action. It was contended on behalf of the Government on appeal that there was nothing to indicate and no reason to believe that the prosecutor anticipated the answer that was given. It will be observed that the answer did not even specifically state that the defendant had committed the forgery; for all that appears, he might merely have given such information as he had on the subject, and it might have involved entirely different parties. Nevertheless, the Court held that the testimony was reversible error, saying it was not too much concerned with the innocence or guilt but that the vital requirement was a fair trial. The Court cited in support of its views the controlling decisions in *McCandless* v. *United States*, 298 U. S. 342, 80 L. Ed. 1205; *Bihn* v. *United States*, 328 U. S. 633, 90 L. Ed. 1495; and *Kotteakos* v. *United States*, 328 U. S. 750, 90 L. Ed. 1557.

In *Massei* v. *United States*, 214 F. 2d 895, a prosecution against a police officer for evading income taxes, the First Circuit held it reversible error to receive admissions by defendant that he had previously received graft.

The foregoing cases are but a few of the numerous authorities unanimously holding receipt of evidence of the type attacked a serious and prejudicial invasion of the rights of a person accused of crime. The public abhorrence of the narcotic traffic is such that an individual charged with such an offense faces a difficult task in defending against the indictment, and the interests of justice require that he be not subjected to the additional burden of insinuations of complicity in other crimes.

POINT 6

The trial Court erroneously denied a motion to strike improper testimony that appellant Gernie had in his possession a certain marked bill more than two months after it had been paid over by a Government agent to Buzzeo.

Appellate Gernie was arrested on September 18, 1956 (R. 169). He was searched and was found to have $412 in cash on his person, including, Pera testified, a $100 bill which had been used by a Government agent to purchase narcotics from Buzzeo on July 12, 1956 (R. 170-171). In view of the fact that sixty-eight days had elapsed between the two incidents—apart from other logical considerations—a motion was made to strike the testimony regarding the identity of the bill. Not only was this motion denied (R. 542-543), but the instructions to the jury compounded the erroneous ruling in the following language (R. 586):

> "Later on, on September 18th—this is over two months later—Gernie is arrested. They searched Gernie and found one of these $100 bills on his person, and that is Government's Exhibit 6-A in this case.
>
> "You have to ask yourselves how did he get this money? Was it a fortuitous circumstance? Did it have something to do with the narcotics traffic or is he being unjustly and improperly blamed for something that he had nothing to do with?"

We submit that it was error to receive this proof, to deny the motion to strike and to permit the jury to consider it as evidence of guilt. Should the ruling below be deemed sound, every individual chancing to handle a

banknote originally marked as evidence of crime would be doing so at his peril. The modes whereby this bill might have come into appellant's Gernie's possession are too myriad to admit of enumeration. Buzzeo might have paid a lawful debt therewith. He might simply have asked Gernie to change it. The money could have passed in the course of a card game. It could have gone through a dozen intermediate hands before Gernie ever saw it. Indeeed, it could have been stolen. Yet none of these means, to say nothing of legion others, carries with it any semblance of participation in narcotics traffic. To render evidence of this type admissible, the least requirement should be some close proximity in point of time and incident. Otherwise the proof is of such scant or conjectural value as to have its capacity for prejudice far outweigh any possible probative force.

In *Williams* v. *United States*, 168 U. S. 382, 42 L. Ed. 509, which we cite as somewhat analogous, the defendant in an extortion prosecution was shown at the time in question to have made bank deposits far in excess of his salary. In holding this to be reversible error, the senior Mr. Justice Harlan wrote:

> "There was no such connection shown between the possession by the defendant of the sums specified in the affidavit and bank books, and the alleged extortion by him of two named sums from certain persons, under color of his office, as required him to explain how he acquired the moneys referred to in the affidavit and bank books. The manifest object and the necessary effect of this evidence were merely to give color to the present charges, and to cause the jury to believe that the accused had in his possession more money than a man in his condition could have obtained by honest methods, and, *therefore*, he must be guilty of extorting the two sums in question. The present case does not come within the

> rule of evidence referred to by the learned court . . . The accused was entitled to stand upon the presumption of his innocence, and it cannot be said from anything in the present record that he was under any obligation arising from the rules of evidence to explain that which did not appear to have any necessary or natural connection with the offenses imputed to him. In our judgment the court, under the circumstances disclosed, erred in not excluding the affidavit and bank books as evidence, as well as in what it said to the jury on that subject."

The rationale of the foregoing decision calls for a holding that the trial Court erred herein.

It has been held by various Courts that proof of a defendant's possession of money is inadmissible in the absence of a clear connection with the commission of the crime charged. See *Turner* v. *State*, 124 Ala. 59, 27 So. 272; *Leath* v. *State*, 132 Ala. 26, 31 So. 108; *People* v. *McGeoghegan*, 325 Ill. 337, 156 N. E. 378. Most recently, in *Lee* v. *United States*, 245 F. 2d 322 (advance sheets of August 26, 1957), it was held reversible error to admit proof that certain bills found in appellant's apartment and on his person were included in payments by a Narcotics Bureau agent for heroin, the Ninth Circuit writing (by Hamley, *Circ. J.*):

> "This money was neither contraband, counterfeit nor stolen. Its mere possession by appellant or any one else would not be a crime. . . . It did tend to prejudice appellant greatly in the eyes of the jury."

POINT 7

In charging on the credibility of witnesses, the trial Court omitted from the rule of *falsus in uno* the necessary qualification that the testimony had to relate to material facts.

In charging the familiar rule relating to the testimony of a witness which was false in part, the Court said (R. 589):

> "What do you do with witnesses if you find they told wilful falsehoods? The law says that you can either reject everything on the ground that all of the testimony is tainted by that falsehood or that you can accept that which is credible and reject that which is incredible. That is what the law says you can do with respect to witnesses who you believe told a wilful falsehood"

The foregoing is not a correct exposition of the law in that it makes no mention of the essential circumstance that the testimony must relate to a material fact. As is stated in Abbott's Criminal Practice, 4th Ed., Sec. 680 (emphasis supplied):

> "The Court may properly charge the jury that if they believe that a witness testifying *as to matters material to the issues* has wilfully testified falsely *as to any fact before them* they are authorized to, but not bound to disbelieve his entire testimony."

In 23 C. J. S. 827 it is set forth as an integral part of the rule "that a witness has wilfully and corruptly testified falsely as to any material fact," and it is further said:

> "The instructions should be correct as to their characterization of the false testimony as wilful or corrupt or as given knowingly or intentionally and

as to the necessity that the false testimony be material."

The omission of the necessary qualification is reversible error. *People* v. *Parsons*, 192 App. Div. 841, 183 N. Y. S. 100; *People* v. *Engargola*, 255 App. Div. 980, 8 N. Y. S. 2d 4.

CONCLUSION

For all of the foregoing reasons, the judgment appealed from should be reversed.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Appellants.

APPENDIX

Docket Entries

(A)

THE UNITED STATES

vs.

EDWARD OGULL counts 1-2-3-7
PHILIP BUZZEO counts 1-2-3-7
JOSEPH GERNIE counts 2-3-4-5-6-7
MICHAEL EDWARD MAYER counts 2-4-5-6-7

Violation—

Title 21 Secs. 173-174 USC
Title 18 Sec. 371 USC
Title 26 Sec. 7237 USC
Unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transp. concealment and sale of heroin.
Unlaw. possession of heroin.
Conspiracy to violate the Narcotic laws.
7 Counts

DATE	PROCEEDINGS
10-19-56	Filed Indictment.
10-23-56	Joseph Gernie pleads not guilty. Bail of $30,000. in C 151-90 to be re-written to cover this indictment.
	Michael Edward Mayer pleads not guilty. Bail of $10,000. in C 151-90 to be rewritten to cover this indictment. Bryan, J.
10-25-56	Deft. Edward Ogull Pleads not guilty—Bail Continued ($3,500). Bryan, J.
10-25-56	Deft. Philip Buzzeo Pleads not guilty—Bail continued ($10,000) Bryan, J.

Docket Entries

DATE	PROCEEDINGS
11- 2-56	Filed affidavit of Malcolm Monroe, Assist U. S. Attorney for a Writ of Habeas Corpus ad Prosequendum for deft Joseph Gernie dated 11-1-56.
(B)	
2- 6-57	Filed affidavit of Jerome J. Londin, Assist. U. S. Atty dated 2-6-57 for a writ of Habeas Corpus ad Testificandum for Benjamin Harrell, Jr. Iss. Writ. Ret. forthwith.
2- 4-57	Deft. Philip Buzzeo withdraws plea of not guilty and pleads guilty to counts 1-2-3 and 7. Bail revoked. Sentence set for 2-25-57 at 10:15 A.M. Remanded. Palmieri, J.
	Deft. Michael Edward Mayer withdraws plea of not guilty and pleads guilty to counts 2-4-5-6 & 7. Bail revoked. Sentence set for 2-25-57 at 10:15 A.M. Remanded. Pre-sentence report ordered. Palmieri, J.
2- 4-57	Trial begun as to Defts. Ogull and Gernie before Judge Palmieri and jury.
2- 5-57	Trial cont'd.
2- 6-57	Trial cont'd.
2- 7-57	Trial cont'd. Count 4 withdrawn by Government. Government rests.
2- 8-57	Trial cont'd.
2-11-57	Trial cont'd. and concluded. Jury retires to deliberate. Jury returns verdict of guilty as

Docket Entries

DATE	PROCEEDINGS
	charged in counts 1-2-3 and 7 as to Deft. Edward Ogull, and guilty as charged in counts 2-3-4-5-6 and 7 as to Deft. Joseph Gernie. Both defendants move to set verdict aside—Denied. Government moves to remand Deft. Ogull—Granted. Both defendants remanded. Sentence set for 2-19-57 at 10 A.M. Palmieri, J.
2-11-57	Filed a true copy of a writ of habeas corpus ad testificandum for Benjamin Harrell, Jr. dated 2-6-57. and entered Marshal's return dated 2-7-57. Writ satisfied 2-7-57. Palmieri, J.
2-19-57	Filed Judgment as to Edward Ogull—Sentence—Five Years on counts 1-2-3 and 7 to run concurrently at a place of confinement to be designated by the Atty. Genl. of the U. S. Fined $1. on each of counts 1-2-3 and 7. Fines remitted. Remanded. Palmieri, J.
2-19-57	Filed Judgment #61442 as to Philip Buzzeo—Sentence—Five Years on counts 1-2 and 3 and Six Years on count 7 to run concurrently at a place of confinement to be designated by the Atty. Genl. of the U. S. Fined $1. on each of counts 1-2 and 3. Fines remitted. Fined $5,000 on count 7. Fine on count 7. to be paid or to stand committed until he is otherwise discharged according to law. Remanded. Palmieri, J.
2-19-57	Filed Judgment as to Michael Edward Mayer—Sentence—Five Years on count 2. Five Years and Six Months on counts 4-5-6 and 7 to run concurrently at a place of confinement to be

Docket Entries

DATE	PROCEEDINGS
	designated by the Atty. Genl. of the U. S. Fined $1. on count 2. Fine remitted. Remanded. Palmieri, J.
2-19-57	Filed Judgment #61441 as to Joseph Gernie—Sentence—Five Years on counts 2 and 3. Fined $1. on each of counts 2 and 3. Fines remitted. Sentenced—Ten Years on counts 5-6 and 7. Fined $5,000 on count 7. Fine on count 7. to be paid or to stand committed until he is otherwise discharged according to law. Sentences on counts 2-3-5-6 & 7 to run concurrently, but consecutively to sentence defendant is presently serving imposed by Judge Bryan on 10-31-56 for violation of probation on C117-246. at a place of confinement to be designated by the Atty Genl. of the U. S. Remanded. Palmieri, J.
2-19-57	Issued commitments and copies for Edward Ogull, Philip Buzzeo, Joseph Gernie and Michael Edward Mayer.
(C)	
2-21-57	Filed notice of appeal as to deft. Edward Ogull.
2-20-57	Filed notice of appearance by Jacob W. Friedman, 170 Bway NYC as atty for Joseph Gernie.
2-26-57	Filed remands (2) as to Defts. Mayer and Buzzeo dated 2-4-57 Palmieri, J.
2-26-57	Filed Remand as to Deft. Ogull dated 2-11-57. Palmieri, J.

Docket Entries

DATE	PROCEEDINGS
2-26-57	Filed commitments (4) and entered marshal's return. Defts. Edward Ogull, Philip Buzzeo, Joseph Gernie and Michael Edward Mayer delivered to Det. Hdqtrs. NYC—2-19-57 for service of sentence or transfer to another institution by prison van.
2-26-57	Filed Writ of Habeas Corpus ad prosequendum for Joseph Gernie. Writ satisfied 2-19-57. Palmieri, J.
2-27-57	Filed affidavit of John S. Clark, Assist. U. S. Atty., dated 2-25-57 and order dated 2-26-57 for a Writ of Habeas Corpus Ad. Testificandum for Joseph Gernie, to be examined on oath concerning his property. Noonan, J. Iss Writ. Ret. 3-1-57.
2-27-57	Filed affidavit of John S. Clark, Assist. U. S. Atty., dated 2-25-57 and order dated 2-26-57 for a Writ of Habeas Corpus Ad. Testificandum for Philip Buzzeo, to be examined on oath concerning his property. Noonan J. Iss Writ. Ret. 3-1-57.
2-27-57	Filed notice of appeal to US CA by deft. Joseph Gernie.
2-28-57	Filed Opinion #23297 by Judge Palmieri dated 2-11-57 Re: Submitting special questions to the Jury.
3-1-57	Philip Buzzeo and Joseph Gernie—Both sworn in supplementary proceeding. Bicks, J.

Docket Entries

DATE	PROCEEDINGS
3- 4-57	Filed Writ of habeas corpus ad testificandum for Philip Buzzeo, and entered Marshal's return dated 3-1-57. Writ Satisfied 3-1-57. Bicks, J.
3- 6-57	Filed Writ of Habeas Corpus ad prosequendum for Joseph Gernie and entered Marshal's return dated 3-1-57.
3-18-57	Mary Gernie, a 3rd party sworn in supplementary proceedings in USA v. Joseph Gernie. Murphy, J.
3-18-57	Marion Quinn, a 3rd party sworn in supplementary proceedings in USA v. Philip Buzzeo. Murphy, J.
3-28-57	Filed Transcript of record of proceedings, Feb. 4-5-6-7-8-11 and 19, 1957.

A TRUE COPY

HERBERT A. CHARLSON, Clerk

By RAOUL BRUGO
Deputy Clerk

(Court Seal)

Indictment

(622) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Indictment No. C151—135

[SAME TITLE]

The Grand Jury charges.

1. On or about the 14th day of April, 1956 in the Southern District of New York,

EDWARD OGULL and PHILIP BUZZEO

the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug; to wit,

approximately 8 ounces 273 grains of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code)

Indictment

(623) SECOND COUNT

The Grand Jury further charges:

On or about the 4th day of June, 1956 in the Southern District of New York

EDWARD OGULL, PHILIP BUZZEO, JOSEPH GERNIE and MICHAEL EDWARD MAYER

the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit,

approximately 8 ounces 211 grains of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code).

(624) THIRD COUNT

The Grand Jury further charges:

On or about the 12th day of July, 1956 in the Southern District of New York

EDWARD OGULL, PHILIP BUZZEO and JOSEPH GERNIE

the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit,

approximately 8 ounces 235 grains of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code).

(625) FOURTH COUNT

The Grand Jury further charges:

On or about the 2nd day of August, 1956 in the Southern District of New York

MICHAEL EDWARD MAYER and JOSEPH GERNIE

the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit

approximately 1 ounce of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code)

Indictment

(626) FIFTH COUNT

The Grand Jury further charges:

On or about the 6th day of August, 1956 in the Southern District of New York

MICHAEL EDWARD MAYER and JOSEPH GERNIE

the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit,

approximately 2 ounces 215 grains of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code).

(627) SIXTH COUNT

The Grand Jury further charges:

On or about the 18th day of September, 1956 in the Southern District of New York,

MICHAEL EDWARD MAYER and JOSEPH GERNIE

the defendants, unlawfully, wilfully and knowingly did receive, possess, conceal and facilitate the transportation and concealment of a narcotic drug; to wit,

approximately 57 ounces 340 grains of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics may find necessary to provide for medical and legitimate uses only, is prohibited. (Sections 173 and 174, Title 21, United States Code).

(628) SEVENTH COUNT

The Grand Jury further charges:

1. On or about the 1st day of April, 1956 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

EDWARD OGULL, PHILIP BUZZEO, JOSEPH GERNIE and MICHAEL EDWARD MAYER

the defendants, and others to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate the United States Code, Title 26, Sections 4704(a), 4701, 4703, 4724(c) and 4771(a), and Title 21, Sections 173 and 174.

2. It was part of the said conspiracy that the said defendants unlawfully, wilfully and knowingly would sell, dispense and distribute a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, in that the said narcotic drugs would not be in the original stamped package or from the original stamped package, that is to say, that there would not be affixed to the container in and from which the said defendants would

sell, dispense and distribute the narcotic drugs as aforesaid any United States Internal Revenue Stamps as required by Section 4703 of Title 26, United States Code in violation of Sections 4701, 4703, 4704(a), and 4771(a) of Title 26, United States Code.

(629) 3. It was further a part of said conspiracy that the said defendants, being persons who had not registered and who had not paid the special tax provided for by Sections 4702(a), 4721 and 4722 of Title 26, United States Code, unlawfully, wilfully, and knowingly would have in their possession and under their control a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, in violation of Section 4724(c) of Title 26, United States Code.

4. It was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, sell and facilitate the transportation, concealment and sale of the aforesaid narcotic drugs, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

OVERT ACT

1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 13th day of April, 1956, in the Southern District of New York, Edward Ogull and Philip Buzzeo, defendants, were at the premises designated as 360 12th Avenue, in the City of New York.

2. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 14th day of April, 1956, Philip Buzzeo, a defendant, delivered approximately

one quarter kilogram of heroin to a man on West End Avenue in the City of New York.

(630) 3. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 20th day of April, 1956, in the Southern District of New York, EDWARD OGULL, a defendant, was at the premises designated as 304 West 40th Street, in the City of New York.

4. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 3rd day of June, 1956, in the Southern District of New York, EDWARD OGULL, a defendant, was at the premises designated as 360 12th Avenue, in the City of New York.

5. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 3rd day of June, 1956, in the Southern District of New York, PHILIP BUZZEO, a defendant, was at the premises designated as 101 West 66th Street, in the City of New York.

6. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 4th day of June, 1956, in the Southern District of New York, PHILIP BUZZEO and JOSEPH GERNIE, defendants, were at the premises designated as the Lighthouse Cafe at 76th Street and Broadway in the City of New York.

7. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 4th day of June, 1956, in the Southern District of New York, JOSEPH GERNIE and MICHAEL EDWARD MAYER, defendants, were at the premises described as the Devonshire Garage on 76th Street in the City of New York.

8. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 4th day of June, 1956, in the Southern District of New York, PHILIP BUZZEO, a defendant, delivered approximately one quarter kilogram

of heroin to a man on Amsterdam Avenue in the City of New York.

(631) 9. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 12th day of June, 1956, in the Southern District of New York, EDWARD OGULL and PHILIP BUZZEO, defendants, were at the premises designated as 360 12th Avenue in the City of New York.

10. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 11th day of July, 1956, in the Southern District of New York, EDWARD OGULL, a defendant, engaged in a telephone conversation.

11. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 11th day of July, 1956, in the Southern District of New York, PHILIP BUZZEO, a defendant, was at the premises designated as 101 West 66th Street in the City of New York.

12. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 12th day of July, 1956, in the Southern District of New York, PHILIP BUZZEO and JOSEPH GERNIE, defendants, were at the premises designated as the Lighthouse Cafe at 76th Street and Broadway in the City of New York.

13. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 12th day of July, 1956, in the Southern District of New York, PHILIP BUZZEO and JOSEPH GERNIE, defendants, were at premises described as the Devonshire Garage on 76th Street in the City of New York.

14. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 12th day of July, 1956, in the Southern District of New York, PHILIP BUZZEO a defendant, delivered approximately one-quarter kilo of heroin to a man on 76th Street in the City of New York.

15. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 2nd day of August, 1956, in the Southern District of New York, MICHAEL EDWARD MAYER, a defendant, was at the premises described as the West 67th Street Garage, in the City of New York.

(632) 16. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 6th day of August, 1956, in the Southern District of New York, JOSEPH GERNIE and MICHAEL EDWARD MAYER, defendants, were together at the premises described as the West 67th Street Garage, in the City of New York.

17. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 18th day of September, 1956, in the Southern District of New York, MICHAEL EDWARD MAYER, a defendant, was at the premises described as 307 West 68th Street, in the City of New York.

(Title 18, United States Code, §371; Title 21, United States Code, §174; Title 26, United States Code, §7237.)

JOHN G. WINCHESTER
Foreman

PAUL W. WILLIAMS
United States Attorney

Excerpts from Testimony

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(7) Mr. Frankel: If it please your Honor, as a witness in the case I am informed there is one Maxwell Berner, a so-called special employee of the United States Government, in this case. By special employee I mean a person who is not formally an agent of the Narcotics Bureau but one whom they employed and who is paid by the Government for services in the case. I believe the testimony will show that in the beginning of this case he met my client, it led to certain conversations, which led to a narcotic's agent, who will (8) be a witness in this case and Mr. Berner participated in many of those conversations and meetings.

I don't know whether the Government will have Mr. Berner here or whether the Government will call Mr. Berner as a witness. I therefore ask your Honor to ask the Government to have Mr. Berner here for me so that I might speak with him, because if the Government does not call him as a witness, and I feel the Government should, I might have to.

However, I have been trying to find Mr. Berner. I have been unable to locate him, though I have known Mr. Berner for many years. After I have searched I have not been able to find him. I am asking your Honor to ask the Government to produce him so I might speak with him.

The Court: I take it from what you say that Mr. Berner was an irregular employee of the Government and not continually employed by the Bureau.

Mr. Frankel: My investigation has shown Mr. Berner was employed not only on this matter but involved in other matters in separate cases in this court, charged with the possession and sale of narcotics.

The Court: I take it you don't know what the nature of his employment is.

Colloquy

(9) Mr. Frankel: I know he is a special employee. I described earlier, Judge, he was one whom they used—I don't want to use the word "entrapment" at this moment —but that may come out in my defense—whom they used to get certain people, in order to discover or investigate the sale of narcotics.

The Court: Mr. Londin, is this man available?

Mr. Londin: I don't know Maxwell Berner. I have never met him, I have never known him by name or in person. To the best of my knowledge he is not available. We can't produce him.

The Court: I take it you don't intend to use him.

Mr. Londin: I do not.

The Court: I would appreciate it if you communicate with the agent in charge of this case in order to ascertain his whereabouts, and if he can be made available, please see that that is done. If he can't, please advise me and the attorney as quickly as possible.

Mr. Frankel: May I make a further request?

In view of the fact that I am told that Mr. Berner is not to be used by the Government, I now feel that it is a very unfair method of prosecuting in this (10) case because Berner, the evidence will show, was a Government agent or employee in this case, who participated in all of the conversations and, as such, he should be produced here by the Government and not force the defense to attempt to produce him, since he is their paid agent, to make out a case here as against any one or as against these defendants.

The Court: I know nothing about the facts of the case and I am certainly not in a position to give any instructions to the assistant United States attorney as to how he has to prove his case. That is entirely up to him.

As the evidence proceeds, you can make such motions and requests as you think you are justified in making.

* * * * *

Ivan Wurms—for Government—Direct

(25) IVAN WURMS, called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Londin:

Q. Mr. Wurms, what is your occupation? A. Agent with the Federal Bureau of Narcotics.

Q. How long have you been an agent? A. A year and a half.

Q. What was your occupation before that? A. I was a detective for the Metropolitan Police Department, Washington, D. C.

Q. Have you ever used a name other than Ivan Wurms? A. I have.

Q. What name was that? I. Ike Wasserman.

Q. When did you use that name? (26) A. When I began my undercover work here in New York.

Q. When was that? A. It started January of 1956.

Q. Do you know a person named Edward Ogull? A. I do, sir.

Q. Do you see him here in court? A. I do.

Q. Will you point him out, please. A. The gentleman with the glasses, seated behind Mr. Kove.

Mr. Londin: May the record indicate the witness identified the defendant Ogull?

The Court: Yes.

Q. When did you first meet the defendant. Edward Ogull? A. April 13, 1956.

Q. Where on April 13, 1956 did you meet him? A. King's Diner, 360 Twelfth Avenue, New York City.

Q. Mr. Wurms, about what time of day was that? A. 2:30 p.m.

Q. Was he introduced to you as Edward Ogull at the

time? (27) A. No, sir. He was introduced as Eddie Brandeis.

Q. Did he answer to that name? A. Yes.

Q. How were you introduced to him? A. As Ike Wasserman.

Q. Who introduced you? A. Special Employee Max Berner.

Mr. Frankel: What is the name?
The Court: Repeat it, please.
The Witness: Max Berner.

Q. What did you say to Ogull and what did he say to you? A. We had a general conversation concerning Mr. Ogull's work on the pier, that he was a foreman on a pier where he assisted in the loading and unloading of ships. This particular day he worked on another pier.

Q. Did he make a phone call after that general discussion?

Mr. Frankel: May I object to that as leading.
May I have the entire conversation if he were asked as to a conversation and not to lead?

Q. What happened after he told of his employment? A. He excused himself and said he has to make a (28) phone call.

Q. What happened after that? A. The special employee left the table where I was sitting and joined Mr. Ogull and they left the diner and entered a 1950 Buick parked outside the diner. About 3:05 p.m., Phil Buzzeo entered the diner and took a seat at the north portion of the diner at the counter.

A few minutes later Ogull and the special employee reentered the diner and approached me and Ogull told me we had better go outside we could talk better outside.

I joined Ogull and the special employee and when we left the diner Ogull told the special employee and myself to enter the car.

Ogull then reentered the diner and joined Buzzeo and they were engaged in conversation. About five minutes later they came outside and stood in front of the diner.

Q. Who? A. Ogull and Buzzeo.

Q. What happened after that? A. A few minutes later Ogull came over to the car and told the special employee to get out of the car and he joined Ogull and Buzzeo.

(29) A few minutes later the special employee and Buzzeo entered the car and Buzzeo was introduced to me as Bob, and I was introduced as Ike Wasserman.

At that time the special employee left the car and rejoined Ogull in front of the diner.

Q. Did you and Buzzeo have a conversation? A. We did.

Q. What did Buzzeo say to you and what did you say to him?

Mr. Kove: I appreciate the difficulty but at this point I object to any conversation as not binding on Gernie.

The Court: Do you represent this conversation will be related to the defendant Gernie?

Mr. Londin: Yes.

The Court: I will take it subject to connection.

Mr. Frankel: I make the same objection.

The Court: The same ruling.

Q. What did he say to you? A. Buzzeo said, "I understand you wanted some."

I said, "But I want to settle the quality and the price first."

He told me that the stuff that he could deliver would be 90 percent for sure but he was telling me 90 (30) percent because it was really 95 percent.

I looked at him and said, "Who are you kidding?"

He said, "It is true, and Eddie said you would be satisfied with 85, and I knew I could satisfy you."

Q. You said you used the word "Stuff." Does that word "stuff" have a special significance in the narcotics traffic, if you know? A. It does.

Q. What is that meaning? A. Heroin.

Q. Then did you have any further discussions with Buzzeo? A. I did at that time. I told him I wanted a quarter kilo and we discussed the price and Buzzeo agreed to sell me a quarter kilo for $2,750.

Q. How much is a quarter kilo? A. Approximately 8 ounces, 8¾ ounces.

Q. Then he asked for what, $2,750, did you say? A. That's right.

Q. What did you say? A. I agreed to it.

Q. Did he say anything about anything else, about narcotics, other than the price, after he mentioned (31) that to you? A. Just that the stuff he could get was right off the ship. At that time I tried to get a sample.

Q. What did he say? A. He said that he could give me a sampl which would be pure, and on the initial delivery he could give me some stuff that wasn't heroin at all.

I finally agreed to it and purchased a quarter kilo. With that, arrangements were made. I asked Buzzeo where I should meet him for the deal and he said Lowry's Bar at 465 Fourth Avenue at eight o'clock that evening.

Q. Did he discuss—he said the stuff was pure; is that it? A. He said it was going to be pure, that he could deliver.

* * * * *

(57) Q. What did Buzzeo say? A. He suggested I wait. I told him that I had this other commitment, I had to move stuff out, I couldn't wait. He said, "Wait a minute. I have to make a phone call."

Ivan Wurms—for Government—Direct

He called me over to the phone booth. "The (58) best they can do is 12:30. Can you wait?"

I said, "No."

He again spoke and said, "How about 9:30 Monday?"

I said, "That will be fine."

A short time later I left.

Q. Did you in fact come back at 9:30 next Monday? A. I did.

Q. What day was that, do you recall? A. June 4th.

Q. You got to the Ship Ahoy Bar at what time? A. About 9:30 p.m.

Q. Did you meet anyone you knew? A. Phil Buzzeo.

Q. What happened? A. We had a general conversation. I asked him how soon I could leave. He said we would have to go somewhere else and pick it up but I should be on my way by 10 or 10:15. I said that would be fine.

We left a short time later and walked—

Q. Did you say anything to Buzzeo about the price at this time, if you recall? A. I believe I asked if he could do better on the price, but he refused.

(59) Q. Was there any discussion about price that you can recall dealing with this quantity or any other quantity? A. I believe I told him that I spoke to some people, that I could pick up a kilo for between $7,000 and $8,000.

Q. What did he say to that? A. He said "You probably could, but when you test the stuff the quality wouldn't be as good as mine and you will come running back to me."

Q. Did he quote you a price on a full kilo? A. I asked what he was selling it for and he said $11,500. I said that was a little stiff. He said, "The quality would be what you had the last time and you would be more than satisfied."

Q. What happened after this? A. We left the Ship Ahoy and walked west on 66th Street and entered the 1955 Chevrolet, New York registration CW4491.

Q. The same one you had been in before? A. Yes, sir;

that was parked by the Marie Antoinette Hotel, 66th Street and Broadway.

Q. Where did you drive to? A. We went down west on 66th Street to Amsterdam Avenue, north on Amsterdam to 73rd Street, west on 73rd (60) Street to Broadway, north on Broadway to 76th Street and parked in front of the Beacon Garage, 210 West 76th Street.

Q. Is that anywhere near the Devonshire Garage? A. It is right across the street.

Q. What happened then? A. Buzzeo asked me if I had the money. I said yes, and asked if he had the stuff. He said no.

Q. What time was this, about what time? A. About 9:55 p.m.

Q. What did Buzzeo say after he said he didn't have the stuff? A. He said he had to pick it up, he would be back in about ten minutes, twenty minutes.

Q. Did he tell you where you should wait until he came along? A. He said, "Wait right in the car here."

Q. What did you say to Buzzeo? A. I was a little reluctant to give the money. He said, "You don't have to worry. I will leave the car."

With that I handed Phil Buzzeo $3,000 official Government advance funds, the numbers of which had been previously recorded.

* * * * *

(75) *By Mr. Londin*:

Q. You just testified, Agent Wurms, that on July 12th you returned to the Dolphin Cafe about 9 o'clock. A. Yes, sir.

Q. What happened there? A. I entered the Dolphin Cafe and met Phil Buzzeo.

Q. Did he have anything to say? A. Buzzeo told me that the weather didn't look too good.

Q. What did you say to that? A. I said, "What do you mean?"

He said, "You know what I mean. There is a little heat on. It might not go through tonight."

I said, "Don't hang me up again. I have had certain commitments and I have to leave town."

(76) He said, "Wait a minute. I will make a phone call."

He made a call and came back and said, "Everything looks all right. We will have to leave here about 10:30."

We had a general conversation and at that time I told Buzzeo, "I hear a lot of people call you Phil. Is that your name?"

He said, yes. I then asked him how soon I would be on my way. He said, "You should be on your way shortly after 10:30."

Q. Did he have anything to say about another quantity or just the quarter kilo? A. I don't recall.

Q. What happened after this general conversation that you had? A. About 10:30 we left the Dolphin Cafe, walked north on Broadway and entered the 1955 Chevrolet again. We proceeded south on Broadway and made a U-turn and then headed north on Broadway.

Q. Where did you drive? A. Broadway to—

Q. Where did you end up? A. We ended up by the Devonshire Garage. We (77) parked a little east of the office.

Q. Was anything said during the drive? A. Yes. He said he was going to get it from the same people, that I had nothing to worry about, but there might be a little change, I would have to pick the stuff up myself.

He asked me for the money and I handed him $2,800 official Government advance funds, the serial numbers previously recorded at the office.

Q. When had you previously recorded the serial numbers, do you recall? A. They were recorded on July 11th.

Mr. Londin: Please mark this as Government's Exhibit 4 for identification.

(Marked Government's Exhibit 4 for identification.)

Q. I show you Government's Exhibit for identification and ask whether you have seen this before. A. I have.

Q. What is Government's Exhibit 4 for identification? A. This is the list of moneys, the serial numbers which I recorded at the office of the Bureau of Narcotics on July 11, 1956.

Q. What did you do with the money, the serial (78) numbers of which are on Government's Exhibit 4? A. That is the money I handed to Phil Buzzeo on July 12th.

Q. Did you in fact give him everything on this list? A. No.

Q. What did you fail to give him? A. I failed to give him two $50.

Q. And the total of the money was how much? A. $2,800.

Q. The list would have a total of $2,900? A. That's right.

Q. What happened after you gave him the money? A. He said that I would have to wait and that the deal will probably take around twenty minutes.

Q. By the way, do you recall what other agents were present when this list was made up, to the best of your recollection? A. Donald Miller, George O'Connor, Martin Pera.

Q. Do you think there might have been some others around too or are these the only ones you remember? A. Offhand those are the only ones I remember.

Q You said you parked just east of the Devonshire Garage. About what time was that? (79) A. About 10:45, close to 10:45.

Q. What happened? A. Buzzeo alighted from the vehicle. He walked west on 76th Street to Broadway where he met Alphonse Mosca.

Q. He met some other man? A. Yes, sir.

Q. Do you know the name of this other man? A. Yes.

Q. What is that? A. Alphonse Mosca.

Q. What happened then? A. They walked north on Broadway, disappeared from my view.

Q. What happened next? A. About 10:50 or 10:55 I observed a 1955 two-tone Oldsmobile drive up and enter the garage entrance of the Devonshire Garage. I identified the driver as Joseph Gernie.

Q. The man seated right here? A. With the bowtie, yes.

Mr. Londin: May the record indicate the witness identified the defendant Gernie?

The Court: Yes.

(80) A. Joseph Gernie parked the car in the garage. He came out and proceeded to walk west on 76th Street and when he approached the side door of the Lighthouse Cafe, Phil Buzzeo came out of the cafe, they shook hands and both entered the side door of the Lighthouse Cafe.

Q. You said the side door. Will you describe the layout of the Lighthouse Cafe to the jury so they can understand this. A. It is located on the northeast corner of 76th Street and Broadway. The front entrance is on Broadway and it extends all the way down to the Devonshire Garage, and there is a side entrance which is closer to the Devonshire Garage.

Q. On what street is that side entrance? A. 76th Street.

Q. You saw Gernie and Buzzeo go into the Lighthouse Cafe. What happened after that? When was the next time you saw either Buzzeo or Gernie? A. I believe close to 11 o'clock. Buzzeo came out of the Lighthouse Cafe and was followed by Gernie.

Q. You say followed by. How close was Gernie to him? A. About four feet behind him when they were walking.

(81) Q. Buzzeo was walking ahead and Gernie was behind him? A. That's right.

Q. What happened then? A. Buzzeo entered the car entrance of the garage and Gernie walked through the car entrance into the garage office.

A short time later Buzzeo came out through the garage office and entered the car. He took a brown paper bag from under his sportshirt between his waistband and belt and handed it to me.

Q. You say Buzzeo went into the garage and Gernie went in after him before that? Buzzeo went in the car entrance and went to the garage office.

Q. Buzzeo, shortly after that, came out and rejoined you? A. After he went to the garage office he passed Gernie, and Buzzeo came out and entered the car.

Q. He then took a package from the waistband of his trousers? A. That's right.

Q. Were did you go after that? A. We proceeded east on 76th Street to Amsterdam (82) Avenue and north on Amsterdam to 77th Street and at 77th Street and Broadway I alighted from the vehicle and returned to the office of the Bureau of Narcotics.

Q. Did you inspect the package you got from Buzzeo? A. Yes, sir.

Q. Can you describe it? A. It was a double sandwich bag inside a brown paper bag.

Q. What was in the double sandwich bag? A. White powder.

Q. What did you do with the package and the contents? A. I surrendered the evidence to Agent Donald Miller.

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Ivan Wurms—for Government—Cross

(89) *Cross Examination by Mr. Frankel*:

* * * * *

(92) Q. Did you learn from Max Berner how he came to go into that business? Just tell us yes or no. A. Which business?

Mr. Londin: I object to that as irrelevant.

The Court: Sustained. You are asking about the hat frame business?

Mr. Frankel: Yes.

The Court: I sustain the objection on the ground that it is irrelevant and remote.

Q. Did Max Berner discuss the hat frame business with you?

Mr. Londin: Objection, your Honor. The same objection, irrelevant.

Mr. Frankel: I am trying to lead up to certain conversations.

The Court: You are opening the door. I put (93) you on notice by opening up the door to conversations between this agent and Berner, you afford the prosecutor a subsequent opportunity to explore the conversations.

Mr. Frankel: I will withdraw the question and get it another way.

Q. Do you know whether Max Berner has a criminal record? A. He has, Mr. Frankel.

Q. You say he has a record? A. He has.

Q. When you met him you knew what his record was, did you not? A. At that time, no.

Q. Since that time you have learned, have you not? A. Yes, sir.

Q. Do you know how many convictions if any Max Berner had?

Mr. Londin: Objection. He is not on trial. He is not a witness.

The Court: Sustained. His credibility is not an issue here.

* * * * *

(95) Q. Do you know if he had just come out of jail at that time?

Mr. Londin: Objection.

The Court: Sustained.

Mr. Frankel: Exception.

* * * * *

(102) Q. Did you meet him from time to time at the Bureau office or near the Bureau office? A. Yes, I met him from time to time.

Q. How did you arrange to contact him?

Mr. Londin: I must object to all this line of testimony on the ground it is not an issue. The conspiracy started sometime in April 1956. None of these meetings and conversations have been shown to have any relevance at all.

The Court: I will sustain the objection.

* * * * *

(148) ANTHONY ZIRILLI, called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Londin:

* * * * *

(151) Q. Do you know Joseph Gernie? A. Yes, sir.

Q. Do you see him here in court? A. That is the gentleman at the end there (indicating).

Mr. Londin: May the record indicate the witness identified the defendant Gernie?

The Court: Yes.

Q. When did you see Gernie? A. On August—

Q. The first time you recall seeing him. A. August 6th.

Q. Where was that? A. I saw him at the intersection of Columbus Avenue and 67th Street.

Q. About what time was that? A. About 9 p.m.

Q. To the best of your recollection. A. About 9 p.m., I believe. Buzzeo parked his (152) automobile—

Q. First of all, we are on Gernie. You saw him about 9 o'clock. What was he doing? August 6th was it? A. August 6th.

Q. What did he do? A. He drove up in his automobile—wait a minute—I believe it was later than that. That was closer to 10 o'clock.

Q. About 10. What did Gernie do? A. He parked an automobile on 67th Street at Columbus and he left his automobile, walked east on the south side of 67th Street and opened the door to a Pontiac, a green Pontiac, parked near 67th Street Garage.

Q. Did you ever see this Pontiac before? A. Yes, I did.

Q. Where? A. It had been driven by one Michael Mayer, I believe his name was.

Q. What did Gernie do when he got to the Pontiac? A. He opened the door and as I passed him I saw a dark package in his hand and he threw it in the Pontiac. Then he shut the door and continued walking and walked to the 67th Street Garage, into the office.

I turned around and starting walking east on (153) the south side of 67th Street. I saw him meet with Mayer, after which Mayer left the 67th Street Garage and entered the Pontiac and he left.

Q. About 10 o'clock you saw Gernie drive up in a car? A. Yes, sir.

Q. What car? A. A 1955 two-tone green Oldsmobile.

Q. What happened after you saw Mayer drive off after he came out of the garage? A. I waited a few minutes and I saw a 1949 Plymouth double-park just east of the 67th Street Garage and Edwards, a man whom I later identified as Edwards, left this automobile and walked to the 67th Street Garage.

Q. What happened there? A. I saw him meet with Joseph Gernie.

Q. Who met with Gernie, was it Edwards? A. Yes, sir, I believe it was Edwards.

Q. Who else did you see around this time? A. There was the driver of the car—there were two colored fellows, one was Edwards and the other one was Benjamin Harell.

Q. Where was Edwards and where was Harell? (154) A. I believe it was Harell—Edwards was driving the car and Harell left the automobile and walked into the 67th Street Garage.

Q. What did Harell do in the garage? A. All I saw him was meet—come together with Mr. Gernie.

Q. Harell and Gernie met in the garage? A. In the office of the garage.

Q. What happened after that? A. Two or three minutes later Harell came out and got into the automobile and they drove out of the area. We fellowed them to 102nd Street.

Q. With whom did you follow? A. Agent O'Connor and I and some other agents followed this automobile to 102nd Street and East River Drive, where we stopped the automobile and—

Q. What did you do then? A. We searched the—then we saw another man, Harold Mobie, I believe his name was, meet Edwards and Harell. We arrested the three and I searched Harell and found 3 ounces of heroin—I found three envelopes containing—

Q. What were they like? A. Three double glassine envelopes containing some (155) white powder.

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(160) MARTIN PERA, called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Londin:

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(161) Q. When did you first see Buzzeo? A. On June 4, 1956.

Q. About what time was that? A. About 5:30 in the afternoon.

Q. Where was this? A. In the vicinity of 69th Street and West End.

Q. For how long did you continue to watch him after that? A. Well, off and on for a period of several months.

Q. But on this particular day. A. On this particular day I continued watching him for several hours in the afternoon and subsequently that night.

Q. About 9:30 do you recall seeing Buzzeo go anywhere with any of the agents? A. Yes, I do.

Q. Will you tell the Court and jury about that. A. About 9:30 p.m. that day I saw Buzzeo with Agent Ivan Wurms at the Ship Ahoy Bar, which is located at 66th Street and Amsterdam Avenue.

They were sitting at the bar until about 9:45 (162) that night, at which time they went out, and Agent Wurms accompanied Buzzeo to Buzzeo's car, which was parked at 66th Street just west of Broadway by the Marie Antoinette Hotel.

Q. What sort of car was it? A. A 1955 Chevrolet sedan, a blue automobile, license number CW4491, to the best of my recollection.

Agent Wurms entered the automobile with Buzzeo, Buzzeo drove then to the Lighthouse Cafe, which is lo-

cated at 67th Street and Broadway. Buzzeo drove up east on 67th Street and parked the car on the south side of 76th Street, just west of Amsterdam Avenue.

Q. What happened then? A. Buzzeo left the automobile and walked into the Lighthouse Cafe.

I followed him and entered about the same time he did. He entered the Lighthouse Cafe from the side entrance and I entered from the front entrance. Buzzeo seated himself at the bar and ordered a drink. I went to the bar and continued observing.

Buzzeo then went to the telephone booth and made a call. There is a public booth inside the bar.

He went back to his place at the bar and about five minutes later a man I subsequently learned and now (163) know as Joseph Gernie—

Q. Do you see that man? A. Yes.

Q. What did he do? A. He arrived and joined Buzzeo at the bar.

Q. Do you see this other man who joined Buzzeo here in court? A. Yes.

Q. Will you please point to him. A. The man at the end of the table there (indicating).

Mr. Londin: May the record indicate the witness has identified the defendant Joseph Gernie?

The Court: Yes.

Q. Then Gernie joined Buzzeo at the bar after the phone call and then what happened? A. They had a conversation that lasted several minutes. Then Gernie went.

Q. When Gernie came in was anything said that you could hear? A. Yes, the bartender, as Gernie approached the bar, said "Hello, Joe," and Gernie acknowledged the greeting.

Q. What happened then? A. After Buzzeo and Gernie met at the bar they (164) had another drink or so and

then Gernie went to the telephone booth and made a telephone call.

Q. What did Gernie do after the call? A. Rejoined Buzzeo, and after they talked for a minute or two, he motioned to Buzzeo to follow him and the two went down the stairs to the basement, which I later learned led to the washrooms of the Lighthouse Cafe.

They were down there about, I would say—well, within five minutes they reappeared. They came up. Then Gernie walked over to the bar, but Gernie left Buzzeo and walked towards the window on the 67th Street side of the Lighthouse Cafe and looked out the window, which has a view of 67th Street and the corner of Broadway.

He stayed there about five minutes or so and Buzzeo remained seated at the bar during that time. After about five minutes, Gernie left his place at the window abruptly and walked back to Buzzeo. They had another conversation and then Gernie left the Lighthouse Cafe by the side entrance.

Q. What did you do? A. I followed him out of the front entrance almost immediately after he left.

(165) Q. To where did you follow him? A. I followed him—I observed him walking east on 76th Street on the north side of the street to the Devonshire Garage. He walked into the garage and I observed him in the office of the garage.

Then I observed him come out with another man I subsequently learned was named Michael Mayer. The two came out, and Mayer went into a 1956, I believe, Oldsmobile, green and white, that bore license number, I believe it is, 7C6735, to the best of my recollection.

Mayer went into this automobile and drove off. He proceeded east on 67th Street, then turned north on Amsterdam Avenue after which he was lost from view. I watched Gernie return to the Lighthouse Cafe and I entered the Lighthouse. After a few moments Gernie and

Buzzeo came out. It is my recollection that Gernie walked behind Buzzeo. Buzzeo walked into the Devonshire Garage, then into the office.

Q. Was he walking with Gernie at this time? A. Gernie was following behind him.

Q. About how close behind? A. Very close. I would say within several yards.

Q. I see. A. Buzzeo walked into the garage.

(166) Q. What did Gernie do? A. Gernie sort of carried behind him and walked into the garage and into the garage office and he was out very quickly.

Gernie kept watching Buzzeo after he got out of the garage. Buzzeo returned to his automobile where Agent Wurms had been waiting all this time and as Gernie watched them, Buzzeo drove off in the automobile with Agent Wurms, in a Chevrolet.

Q. What did Gernie do after this, after they left? A. He returned to the Lighthouse.

Q. Right after they drove off? A. Yes, sir.

Q. Do you recall being in the vicinity of the Lighthouse after that? A. Yes. I was in that vicinity on several occasions after that.

Q. Were you there on July 12th? A. Yes, I was.

Q. About what time was that? A. I was there at about 9 p.m. of that day.

Q. What happened then? A. I was at the Lighthouse Cafe from about 9 p.m. until 9:30.

(167) Q. Then what did you do? A. Then I went to the vicinity of 66th Street and Broadway where at about 10:20 p.m. of that day I saw Agent Wurms and Buzzeo come out of the Dolphin Cafe located on the west side of Broadway, just south of 66th Street.

Q. What did they do? A. Agent Wurms accompanied Buzzeo in the Chevrolet automobile I described previously and which automobile was located about a block or a half block north of the Dolphin Cafe.

Buzzeo drove with Agent Wurms in the automobile to 76th again but this time they parked on the north side of 76th Street, just east of the Devonshire Garage.

Q. What happened then? A. Buzzeo got out of the automobile and walked toward the Lighthouse. He was greeted by a man whom I had seen often in the company of Gernie prior to that time. He went with this man to the Lighthouse Cafe.

Q. What happened after that? A. About 10:50 I saw Gernie drive up in his Oldsmobile that I described previously, which Michael Mayer had driven on previous occasions. I saw Gernie drive up in that automobile and park that car in the (168) Devonshire Garage. He simply put it into the entrance of the garage with the rear of the automobile pointing towards the street.

Q. That was the man you identified before as Joseph Gernie, sitting at that table? A. Yes. He left the car there and walked to the Lighthouse, towards the Lighthouse.

As he approached the Lighthouse, Buzzeo came out of the cafe and shook hands with him in the street and they had a conversation there for a minute or so.

Q. What happened after that? Where did they go? A. They then went into the Lighthouse together. They were in there a short while, when Buzzeo and Gernie came out again.

Buzzeo walked toward the Devonshire Garage, Gernie following behind him again. Buzzeo entered the garage and opened the door to the automobile, to Gernie's automobile which was still in the same position that Gernie left it in.

He opened the door by the driver's seat and entered the automobile for a moment, his foot was outside, he didn't enter all the way, he was sitting partially on the seat. He was there just a moment and then he left the automobile, shut the door and walked out toward the (169) office,

walked through the door that was to the left of the office of the Devonshire Garage.

He was there with Gernie for a moment, then he left the garage through the front office door and rejoined Agent Wurms in the Chevrolet automobile and Buzzeo drove Agent Wurms away from the vicinity again.

Q. This automobile you saw Buzzeo get into briefly was the same automobile, an Oldsmobile, you had seen Gernie driving in before? A. Yes, sir.

Q. At a subsequent date did you arrest Joseph Gernie? A. Yes.

Q. When? A. On September 18th of the same year.

Q. About what time was that and where was that? A. At 10 p.m. we observed Gernie's automobile in the vicinity, just opposite the Devonshire Garage on 76th Street. Then I, accompanied by two other narcotic agents, went into the Lighthouse Cafe where Gernie was seated towards the rear portion of the cafe, where the restaurant is.

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(170) Q. Did you search him? A. Yes, we searched him. He had a wallet, and in that wallet, to the best of my recollection, was a total of $412, some other papers, registration for an automobile, amongst other person effects.

Q. What did you do with the $412? A. I kept it in my custody and took it to the office of the Bureau of Narcotics.

Q. What did you do there? A. Subsequently we compared the serial numbers on each one of the bills. There were two $100s. The numbers on these bills were compared with the numbers of the money that had been used in the purchase of evidence from Philip Buzzeo.

Q. I show you Government's Exhibit 4 for identification. I ask you whether you have seen this before. A. Yes.

Q. What is Government's Exhibit 4 for identification? A. That is a list of the moneys used for the (171) purchase of—

Q. Actually, you yourself do not know about the use of those bills. What did you yourself do with this list? A. At the time it was prepared I observed it being prepared.

Q. When was the next time you saw the list? A. I used this list to compare the serial numbers on the money I seized from Joseph Gernie at the time he was arrested by me.

Q. What were the results of this comparison? A. One of the $100 bills we found on Joseph Gernie at the time we arrested him bore the same serial number and was the same bill used to purchase evidence on July 12, 1956 from Buzzeo.

Q. What did you do with the $412 after that? A. I put it into a lockseal envelope and—

Q. I show you Government's Exhibit 6 for identification. I ask you whether you have seen this before. A. Yes, that is the lockseal envelope that bears my handwriting. This is the envelope in which I placed the money taken from Joseph Gernie at the time he was arrested.

* * * * *

(174) Q. Mr. Pera, on September 18, 1956, did you question Joseph Gernie? A. Yes. Immediately when we placed him under arrest at the Lighthouse, immediately as we came out of the door I asked him where his car was.

Q. Had you previously seen the Oldsmobile you referred to before? A. Yes.

Q. On this day? A. On that date, yes, parked right across the street from the Devonshire Garage.

Q. You asked Gernie about this particular car? A. Yes, I asked him where it was and whether he had a key on his person.

Q. What did he say? (175) A. He said that he didn't have an automobile, he didn't drive a car.

Q. Did you ask him specifically about an Oldsmobile? A. Yes. I asked where the Olds was. He said he didn't

drive a car. He said he had no keys on his person, and he didn't.

Upon searching him he didn't, but he did have a registration to this automobile on his person in somebody else's name, and upon entering the automobile we found the door of the automobile unlocked and the keys up under the sun visor.

Q. Do you have the registration with you? A. Yes, I do.

Mr. Londin: Please mark this for identification.

(Marked Government's Exhibit 8 for identification.)

Q. Mr. Pera, I show you Government's Exhibit 8 for identification. Is that the registration you just referred to? A. Yes, that he had in his wallet at the time we placed him under arrest.

Q. Joseph Gernie? A. Yes.

Q. You went to the automobile and found the keys (176) up in the sun visor? A. Yes.

* * * * *

(181) *Cross Examination by Mr. Kove*:

Q. I believe you told us yesterday on direct examination, and you correct me if I am in error, that the registration which you found in the car, Government's Exhibit 8 in evidence, was taken from the two-tone Oldsmobile that was parked on 76th Street; is that correct? A. No, that is not correct.

Q. You can pick up the facts. A. In my testimony yesterday, what happened, I took that registration from the wallet of Joseph Gernie.

Q. That is the wallet he had in his—the registration in his pocket in his wallet? A. That is correct.

Q. And I think you said yesterday in your testimony—correct me if I am wrong—that the registration (182) as you said was in an assumed name, is that what you meant? A. I said it was made out to the name of Rose Quinn.

Q. Did you make any effort to find out who Rose Quinn was? A. Yes, we had known by that time who she was.

Q. You knew who she was? A. Yes.

Q. Would you tell us, please? A. To the best of my recollection she is related to the wife of Joseph Gernie.

Q. Joseph Gernie's sister-in-law? A. Some relationship.

Q. So far as you know the owner of that car or this registration? A. The registration is made out to her but I never seen her driving the car. The only person I saw was Mr. Gernie.

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(187) Q. Did you find any money at the home? A. Yes, we found—this is my best recollection—there was about $1500 contained in a ladies handbag, and Mrs. Gernie said it was her money.

Q. You took that money, didn't you? A. Yes.

(188) Q. Incidentally, did she tell you where she had gotten that money, or part of it? A. No, she—she first told us it was her money. She subsequently told us it was her husband's money and we could not establish whose money it was. She wouldn't say where it was obtained.

Q. What? A. Where she had obtained it.

Q. Mr. Pera, didn't she tell you part of that money came from her brother who had died? A. I don't recall that.

Q. At any rate, none of that money, none of the bills in that money had any numbers on them corresponding to the list of serial numbers that was outstanding; is that correct? A. None of that money, no.

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Patrick P. O'Carroll—for Government—Direct

(199) PATRICK P. O'CARROLL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

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Direct Examination by Mr. Londin:

(200) Q. On the occasions that you testified, if you did, that you saw what was transpiring in the office, were you able to see through the window? A. When I testified that I saw either Gernie or Buzzeo in there, I was able to see that.

Q. You saw that through the window, did you not? A. Yes.

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(203) Q. Will you tell the Court and jury when you first saw Gernie? (204) A. I first saw him on June 12, approximately June 12, 1956.

Q. When did you see him again after that? A. I saw him again at various periods during the month of June and also in the latter part of July.

Q. Did you see him in August at any time? A. Yes, sir, I did.

Q. What was the first day in August you saw him? A. The first day in August I saw him was on the 2nd day of August.

Q. Where were you at the time? How did you come to see him? A. On August 2nd of 1956 I was in the vicinity of the West End Garage, which is between Columbus Avenue and Central Park East in New York City.

In that vicinity I observed a 1949 Plymouth coupe, a black colored car, drive up and double park outside the garage.

Q. About what time was this? A. About five minutes after ten.

Q. Do you know who was in the car? A. Two colored persons in the car.

Q. Did you learn their names? A. I learned their names at a later date.

(205) Q. What did you learn their names to be? A. I believe one was named Jackson and the other Harell.

Q. Do you know what happened after that? A. After that, this man named Harell got out of the car and walked into the garage. And about three minutes later he walked out of the garage and returned to the car. At that time, I presume that was about ten minutes after ten.

Q. Did you see anyone else at this time? A. Immediately after he walked out of the garage, another person walked out by the name of Michael Mayer.

Q. What happened then? A. He walked to his car, which was a 1952 Pontiac. He got into the car and both cars drove away.

Q. What happened then? A. I was with Agent O'Connor and we followed the 1952 Pontiac which Michael Mayer was driving to 307 West 68th Street.

Q. What happened then? A. At that point Michael Mayer got out of the car and went into the premises of 307 West 69th Street and he was in there, I would say, about ten minutes.

Q. What else did you see in the vicinity of 307 (206) West 68th Street? A. At that time I saw a 1955 Oldsmobile, license plate 736735, which I had previously seen driven by Mr. Gernie, parked about 150 feet way from 307 West 69th Street, down the block.

Q. What happened after that? A. After about ten minutes elapsed, I saw Michael Mayer coming out of the building.

Q. Was anyone with him? A. Two other people with him.

Q. Who were they? A. One person was a man by the name of Alphone Mosca, and the other person was Mr. Gernie.

Patrick P. O'Carroll—for Government—Direct

Q. Do you recall how the defendant Gernie was dressed at that time? A. He was wearing a dark pair of slacks and a checkered sport shirt which was a very small checked sport shirt.

Q. Small checks? A. Yes.

Q. Now what happened after that? You saw them come out of where? A. 307 West 69th Street. They remained in front of the building about a minute or two minutes, (207) talking, or I should say talking but in a sort of loose huddle. Michael Mayer then left and walked to his car and Mr. Mosca walked north to the West End Avenue and Mr. Gernie remained outside the premises of 307. Michael Mayer then drove down the block, it is a block—a dead end street, you have to make a U-turn to come back out again.

Joseph Gernie walked toward the corner when Michael Mayer was going down the block, and proceeded back up. Joseph Gernie walked toward the corner and after Michael Mayer made his right turn Joseph Gernie returned to the premises of 307 West 69th Street.

We then started—I shouldn't say we, I followed Mayer because we proceeded back to the garage at West 67th Street.

Q. Who is the "we"? A. Agent O'Connor.

Q. What did you see there? A. About 10:40 p.m. we observed, or I observed, the person, the colored person Harell walking east on 67th Street and walk into the garage.

Q. Did you see anyone else in the garage at this time other than Harell? A. No, sir, I did not.

(208) Q. What happened after that? A. He was in there for a few minutes and then I observed him walking out of the garage, and at that time he was with Michael Mayer.

They walked about forty or fifty feet toward Central Park West and then they stayed together for a moment and

then they parted, the colored person continuing to Central Park West and Mayer returned to the garage.

Q. That is Harrel you mean went off? A. Yes, sir.

* * * * *

(209) GEORGE J. O'CONNOR, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Londin:

Q. What is your occupation? A. Agent of the United States Treasury Department, Narcotics Bureau.

Q. How long have you been an agent? A. Eighteen years.

Q. Do you know anyone named Philip Buzzeo? A. I do.

Q. When did you first see Buzzeo? A. On June 4, 1956, I had him under surveillance at about 5:30 p.m., from 5:30 to approximately 9:30 in the vicinity of 69th Street and West End Avenue.

At 9:30 I followed him to 66th Street and Broadway and saw him meet Agent Wurms. I then followed Wurms and Buzzeo to 76th Street, between Broadway and Amsterdam Avenue. I saw Buzzeo leave the car and enter the Lighthouse.

Q. What car was this? (210) A. It was a 1955 Chevrolet, CW 4491. Buzzeo left the car and entered the Lighthouse and I saw Agent Pera go in immediately after him. A short time later, about 10:10 p.m., I saw an Oldsmobile drive into 76th Street from Broadway, the license number on the car was 7C6735, and it was driven by a man I knew as Michael Mayer.

Q. What happened after that? A. As Mayer drove the car past the Lighthouse Restaurant, I noticed that Joseph Gernie was looking out the window.

George J. O'Connor—for Government—Direct

Q. Do you see Gernie here? A. I do, sitting with the bow tie on.

Mr. Londin: May the record indicate the witness has pointed to the defendant Joseph Gernie?
The Court: Yes.

Q. You saw Gernie standing at the window looking out? A. I did.

Q. What happened after that? A. Mayer parked the car and Gernie left the Lighthouse and walked to the office of the Devonshire Garage.

Q. How soon after this, the Oldsmobile went by, (211) did Gernie do this? A. As soon as the car passed the window and continued down the street, Gernie disappeared from the window and there was a matter of seconds until he came out the door and continued down the street.

Q. What else did you see? A. I saw both Gernie and Mayer then come out of the office of the Devonshire Garage and I saw Mayer go to his car and saw Gernie walk back toward the Lighthouse Restaurant.

Mayer drove off in the Oldsmobile, 7C6735, and I engaged a taxicab and followed Mayer to the West 76th Street Garage.

Q. What did you see there? A. I saw him double park his car and enter the garage and talk with another man whom I do not know.

Q. When you saw Mayer leave the Lighthouse Bar after the Oldsmobile went by he walked to the garage, you say? A. To the garage office, yes.

Q. Was he alone, was anyone with him? A. He was alone.

Q. Do you know whether anyone was following him out, could you tell? (212) A. No, I don't know.

Q. In August do you recall continuing a surveillance in

the vicinity of this garage? A. Yes, sir. The first surveillance in August was on August 2nd. I had the West 67th Street Garage under surveillance and knew that Michael Mayer was there at the time. I saw a 1949 Plymouth drive into the block and double park outside of the garage.

I saw a man I now know as Ben Harell, leave the car driven by another man I now know as Joseph Edwards, and saw Harell enter the garage office and immediately after that time I saw Mayer leave the garage office and enter his car, a Pontiac, 1950, I believe, 9Z9152, and I followed him to his residence at 307 West 69th Street, where he entered.

Q. What did you see there? A. Shortly before ten-thirty I saw Mayer come out of the house with Joseph Gernie and another man, and they talked for a short time on the sidewalk there and then parted. I then followed Mayer back to the West 76th Street garage.

Q. Did you see any other automobile around there at the time? A. I did.

(213) Q. What was that? A. I saw—

Q. Anyone you particularly remember? A. I saw an automobile that belonged to the other man who came out with Gernie and Mayer. I also saw Gernie's car, 7C6735 that is, parked down in 69th Street west of 307 some distance.

Q. After they came out, what happened, do you recall? A. Mayer got into his car and the other man walked up to the West End Avenue and got into his car and Gernie stood on the sidewalk there and they started to walk up to the corner and turned around and went back to 307.

Q. What? A. West 69th Street.

The Court: Excuse me, the car you are referring to, Mayer's car, was what sort of car?

The Witness: A Pontiac, 9Z9152.

The Court: The car you referred to, 7C6735, was what kind?

The Witness: An Oldsmobile, 1955.

The Court: What color?

The Witness: Two tone green.

(214) The Court: Who was driving that?

The Witness: Mayer drove it on one occasion and that I saw on many occasions Gernie drove it.

The Court: Thank you.

Q. On this particular occasion you saw Mayer drive on in the Pontiac? A. That is right.

Q. This particular Oldsmobile, the two-tone green, 7C— A. 6735.

Q. —was that when Gernie returned to 307 West 69th Street? A. Parked in 68th Street, approximately 150 feet west of 307.

Q. It remained there after Gernie entered the building? A. Yes.

Q. What did you do after that? A. I went back to the vicinity of the West 67th Street Garage and I saw Mayer there standing in front of the garage walking up and down and then I saw Ben Harell approach and enter the garage office and then come out again a short time later with Mayer. They parted.

Q. Were you in the vicinity of the West 67th Street (215) a few days after that? A. Yes. On August 6th, 1956.

Q. About what time was that? A. I got there approximately nine-thirty.

Q. Did you see Gernie there? A. Not at the time I arrived. Mayer was there at that time. But about 9:45 Gernie drove up in 7C6735 and he parked near to Columbus Avenue on the southeast corner of Columbus and 67th Street.

Q. What did Gernie do? A. He walked back toward the West 67th Street Garage in an easterly direction. As he passed Mayer's car, 9Z9152, I saw him open the door of the car and close it again, then entered the garage office.

Benjamin Harell, Jr.—for Government—Direct

Q. From where you stood, could you see what he did when he opened and closed the door? A. No, I couldn't. I saw him open and close the door.

Q. What happened after Gernie entered the garage office? A. Immediately after he entered Mayer came out and entered 9Z9152 and drove to 307 West 69th Street and entered. I then returned to 67th Street and Columbus and picked up Agent Zirilli and followed the— (216) I have gotten ahead of my story, I am sorry.

Q. Just in the order you can recall it happened. A. As Mayer came out and I prepared to follow him away, I noted the same Plymouth which I had seen on August 2nd had arrived, and as I drove past the garage office I could see Gernie inside talking with Ben Harell. Then as I previously stated, I followed Mayer in his car to 307 West 69th Street. Then immediately returned to 67th Street and Columbus and picked up Agent Zirilli, who had the Plymouth under surveillance and followed the Plymouth away.

It was just coming out of the block as I returned. We followed the car to 102nd Street and East River Drive, where we identified ourselves to Harell and Edwards who were in the car and one Albert Mosca, who just approached the car. I witness the search of Harell by Agent Zirilli, and saw him find a package on Harell and find a package on Mobley.

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(295) Benjamin Harell, Jr., called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Londin:

• • • • •

(297) Q. I ask you now, Mr. Harell, this heroin you received, that was taken from you when you were arrested during the early part of August, where did you obtain it?

Donald E. Miller—for Government—Direct

A. I would like to take the Fifth Amendment for that question.

* * * * *

(312) DONALD E. MILLER, called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Londin:

* * * * *

(314) Q. What happened after that? A. I left the Lighthouse and walked to the center mall on Broadway. At about a little after ten o'clock I saw Joe Gernie looking out the side window of the Lighthouse facing 76th Street. A little after that I saw Michael Mayer driving a 1955 Oldsmobile, license number 7C6742, drive by the Lighthouse and park east of the Devonshire Garage, 207 West 76th Street.

I thereafter saw Joe Gernie come out the side door of the Lighthouse Restaurant and walk down and into the garage. A short time later I saw Gernie walk out of the garage and again walk into the side entrance of the Lighthouse.

A short time after that I saw Phil Buzzeo and Joe Gernie walk out of the side entrance of the Lighthouse and stand on the sidewalk talking for just several seconds. I then saw Phil Buzzeo walk down and into the Devonshire Garage. Meanwhile, I saw Joe Gernie take a walk a short distance in the direction of the (315) Devonshire Garage and stand looking in that direction.

Q. What happened after that? A. A little while later I saw Phil Buzzeo come out of the garage and walk up and enter the 1955 Chevrolet where Agent Wurms was sitting and they drove away.

I then saw Joe Gernie walk back into the Lighthouse Restaurant.

Q. What was Gernie doing when Buzzeo was in and

out of the garage? A. Standing on the sidewalk looking in the direction of the Devonshire Garage.

* * * * *

(318) Q. What happened after that? A. About 10:50 that same evening I saw Joe Gurnie driving a 1955 Oldsmobile, New York license number 7C6742, parking in the Devonshire Garage. I saw him walk back to the Lighthouse Restaurant where he met Buzzeo in front.

Then I saw Buzzeo and Gernie walk into the Lighthouse. A few minutes later, about 10:55, I saw Phil Buzzeo and Gernie walk out the side door of the Lighthouse and walk to the Devonshire Garage.

At the garage I saw Buzzeo walk into the automobile entrance and get in the 1955 Oldsmobile, license number 7C6742.

Q. Are you sure that is the correct license number, (319) Agent Miller? Think carefully. A. 6735 is the correct license.

Q. You were mistaken before when you said 6742? A. Yes, sir.

The Court: Will you describe it by color.

The Witness: It was a green and white two-tone.

The Court: And the year, if you know.

The Witness: 1955, a 98.

The Court: Thank you.

Q. Continue now. You saw Buzzeo get into that car? A. Yes, sir.

Q. Just describe for the Court and jury what happened. A. When I saw him, he had just opened the door and was sitting in the automobile at the time. The door was open and he was sitting on the passenger side of the car. Meanwhile Gernie continued walking into the garage office.

Donald E. Miller—for Government—Direct

Q. What happened after that? A. The next thing I saw was Buzzeo inside the garage office talking to Gernie.

Q. What happened after that? A. Buzzeo then walked to the 1955 Chevrolet where (320) Agent Wurms was waiting and they drove away.

Q. Did you see Agent Wurms later that night? A. Yes, sir, at the office of the Bureau of Narcotics.

Q. What happened then? A. There he showed me a package containing a white powder. I saw him remove six staples from that package and put them on two index cards.

Q. Agent Miller, I show you Government's Exhibit 5-F in evidence and ask whether you have seen these before. A. Yes, sir, these appear to be the staples that Agent Wurms took from the package and placed upon that index card.

Q. I also show you Government's Exhibits 5-C, 5-D and 5-E, all in evidence, and ask whether you have seen them before. Deal first with 5-C and -D and -E. A. 5-C and 5-D were the two bags that I would describe as sandwich bags that Agent Wurms gave to me containing a white powder. 5-E is a lunch sack that Agent Wurms turned over to me that same evening.

Q. Will you look at 5-B in evidence, Mr. Miller. Tell the Court and jury whether you have seen that before. A. First, on that same night, I took the packages (321) containing the white powder from Agent Wurms, placed them in a lockseal envelope and put them in a steel cabinet, locked it and retained the key in my possession.

The next day I removed that package and transferred the white powder from Government's Exhibits 5-D and 5-C and placed it into Government's Exhibit 5-B.

Q. 5-B. What then did you do? A. I then placed Government's Exhibit 5-B into a lockseal envelope.

Q. Look at Government's Exhibit 5 for identification.

please, Mr. Miller, and tell the Court and jury whether you have seen this before. A. Government's Exhibit 5 for identification is the lock-seal envelope into which I placed Government's Exhibit 5-B.

Q. What did you do with 5-B and its contents? A. Then I delivered that to the United States chemist.

Q. Was it locksealed when you delivered it? A. Yes, sir, it was.

Q. When was the next time, Agent Miller, that you saw the defendant Gernie? A. On August 6, 1956.

Q. What happened on August 6th? Where did you (322) see him and at what time? A. About 9:45 I saw him park a 1955 Oldsmobile, license number 7C6735.

Q. That is the two-tone green you referred to before? A. Yes, sir, that is correct. At the intersection of 67th Street and Columbus Avenue. I then saw him get out of the Oldsmobile and walk to a 1952 Pontiac, license number 9Z9142. I saw him open the door of the Pontiac and immediately close it and walk into the 67th Street Garage.

Q. What happened then? A. A short time later I saw Michael Mayer come out of the 67th Street Garage and walk down and get into the Pontiac. As I drove by the 67th Street Garage following Mayer in the Pontiac, I looked in the garage office and saw Gernie talking to Ben Harell.

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(461) MICHAEL EDWARD MEYER, called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Kove:

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(464) Q. Did you ever have any narcotic dealings with Joseph Gernie? A. I did not.

Ivan Wurms—for Government—Rebuttal—Direct
Motion for Mistrial

Q. Did you ever get any narcotics from him? A. No.

Q. Did you ever give him any? A. No, sir.

Q. Did you ever get any narcotics from him? A. No, sir.

(465) Q. Did you ever give him any money in connection with narcotic deals? A. No, sir.

Q. Did you ever indicate to him that you were engaged in the narcotic traffic? A. No, sir.

Q. And were you engaged in the traffic and sales? A. Yes, sir.

Q. Did you ever tell Joseph Gernie about it? A. No, sir.

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(510) IVAN WURMS, having been previously sworn, was recalled and testified further in rebuttal as follows:

Direct Examination by Mr. Londin:

• • • • •

(513) Q. Was it on that occasion that you discussed real estate? A. Phil Buzzeo mentioned a piece of property that friend of his had out in California that he had just returned from California and this person wanted to sell it. It was a restaurant and, I believe, in the back they could carry on some gambling games.

Q. Was that the only discussion you had at which Edward Ogull was present in which real estate was discussed or was there any other? A. That is the only occasion that any property was mentioned.

Mr. Londin: Mr. Frankel and Mr. Kove?

Mr. Frankel: In view of the last statement about gambling games, I respectfully move to withdraw a juror and declare a mistrial.

(514) Mr. Londin: That was made only with reference to Philip Buzzeo as I recall.

The Court: I deny the motion.

Mr. Frankel: Exception.

* * * * *

(535) Mr. Kove: If your Honor please, I think perhaps I may be able to take care of the situation in the requests but I have this situation. I have already given your Honor the proposed requests on behalf of the defendant Gernie. Of course, at this time I could not have anticipated the events with respect to the witness Harell. It occurs to me, I did some, shall I say, second thinking last night when I went back to my office and this situation developed: Factually, it would appear as though the Government at least had some intimation that Harell would be to say the least, a reluctant witness. I don't know whether or not he indicated to them that he was going to plead the Fifth Amendment. I asked Mr. Londin and he said he didn't and that, of course, as far as I am (536) concerned, that is sufficient. His word is good with me. It should be. However, it creates this situation. There isn't any question, I believe, that Harell's position on the witness stand, in the light of testimony of one or more of the agents as to his presence at the garage on two occasions, I think together with Gernie, that his taking, getting on the stand and pleading the Fifth Amendment has created an aurora of prejudice against the defendant Gernie.

Whether or not that could be cured by a mere instruction to the jury that they are not to draw any inferences from that, I am not prepared to say. But

I would respectfully suggest that is the minimum amount of caution that can be taken.

The Court: I intend to charge the jury and, of course, I don't want to cut off Mr. Londin, I want him to make whatever statement he wishes to. I had understood from his previous statement that he had no intimation of Harell's claim of immunity under the Fifth Amendment. On the contrary, he had every reason to believe from prior testimony and prior statements given by Harell that he would be a very willing and valuable witness. But I will let him make his own statement if he wishes to make another one at this time.

(537) I intend to charge the jury that Harell's claim of privilege is not evidence against the defendants and that it led to a ruling of law which was a part of my function and that my ruling sustaining his claim of immunity must not be considered to be evidence by them.

• • • • •

(542) Mr. Kove: I respectfully move to strike from the testimony, strike that testimony relating to the money that was taken from the defendant Gernie's pocket and—I don't know the exhibit number—

The Court: 6-A and B.

Mr. Kove: —on the grounds that it is remote (543) from the time when the money allegedly was paid to the defendant Buzzeo.

The Court: Denied.

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Excerpts from Court's Charge

(586) Later on, on September 18th—this is over two months later—Gernie is arrested. They searched Gernie and found one of these $100 bills on his person, and that is Government's Exhibit 6-A in this case.

• • • • •

(589) Q. What do you do with witnesses if you find they told wilful falsehoods? The law says that you can either reject everything on the ground that all of the testimony is tainted by that falsehood or that you can accept that which is credible and reject that which is incredible. That is what the law says you can do with respect to witnesses who you believe told a wilful falsehood.

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Judgment and Commitment
(U. S. A. v. Edward Ogull)

(644) UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 151-135

UNITED STATES OF AMERICA

v.

EDWARD OGULL

On this 19th day of February, 1957 came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly selling, receiving, concealing and facilitating the transportation, concealment and sale of narcotics; and conspiring to violate the Narcotic Laws of the United States. (Title 21, Secs. 173 and 174; Title 18, Sec. 371; Title 21, Sec. 174; Title 26, Sec. 7237 USC.) as charged in counts 1-2-3 and 7 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE YEARS

on each of counts 1-2-3 and 7 to run concurrently with each other. Fined $1. on each of counts 1-2 and 3. Fines remitted.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Edmund L. Palmieri,
United States District Judge.

A True Copy. Certified this 19th day of February 1957.

Herbert A. Charlson
Clerk

Frank Davis
Deputy Clerk

Judgment and Commitment
(U. S. A. v. Joseph Gernie)

(648) UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 151–135

UNITED STATES OF AMERICA

v.

JOSEPH GERNIE

On this 19th day of February, 1957 came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly selling, receiving, possessing, concealing and facilitating the transportation, concealment and sale of narcotics; and conspiring to violate the Narcotic Laws of the United States. (Title 21, Secs. 173 and 174; Title 18, Sec. 371; Title 21, Sec. 174; Title 26, Sec. 7237 USC.) as charged in counts 2-3-5-6-7 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE YEARS

Judgment and Commitment

(*U. S. A.* v. *Joseph Gernie*)

and fined $1. on each of counts 2 and 3. Fines remitted. TEN YEARS on each of counts 5, 6 and 7. Fined $5000. on count 7, and to stand committed until fine on count 7 is paid or he is otherwise discharged according to law. Prison sentences on counts 2-3-5-6-7 to run concurrently with each other, but to run consecutively to sentence defendant is presently serving imposed by Judge Bryan on Oct. 31, 1956 for violation of probation on indictment C 117-256.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EDMUND L. PALMIERI,
United States District Judge.

HERBERT A. CHARLSON,
Clerk.

A True Copy. Certified this 19th day of February 1957.

HERBERT A. CHARLSON
Clerk

FRANK DAVIS
Deputy Clerk